THE TIME TRAP IN INTERNATIONAL PROTECTION: THE MISPLACED NOTION OF "IMMINENCE"

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ABSTRACT

In refugee law, it is widely accepted that a person may qualify for international protection even if they have less than a fifty percent chance of being persecuted. However, there has been a creeping trend for decision-makers to use "imminence," in the sense of time, as a factor in assessing the plausibility of such claims. This Article begins by surveying the elusive and incoherent notion of "imminence" in international law, including in self-defense, peacekeeping, international environmental law, and international human rights law. This analysis provides important context for the next part of the Article, which explores how imminence has been used in two illustrative contexts: protection from the (future) impacts of disasters and climate change and protection of children from anticipated harm. The Article concludes that "imminence" of harm, in a temporal sense, should never be a requirement for international protection.

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I. INTRODUCTION

In refugee law, it is widely accepted that a person may qualify for protection even if they have less than a fifty percent chance of being persecuted.[1] The "well-founded fear" test in refugee law and the parallel "real risk" test in human rights law recognize that the appropriate standard is a "real chance" of persecution or other serious harm.[2] The risk of harm must not be too remote, in the sense that it is "real" and not far-fetched or fanciful, in light of the applicant's individual circumstances.[3] Remoteness thus relates to plausibility rather than temporal considerations, even though they may, too, be implicated. As Guy S. Goodwin-Gill and Jane McAdam explain,

> The question of the likelihood of persecution is in practice inseparable from the personal circumstances of the individual considered in light of the general situation prevailing in the country of origin. Likelihood may vary over time and space, depending, for example, on fluctuations in conflicts, or on the physical proximity of individuals to particular localities, and it

1. *Chan v Minister for Immigr & Ethnic Affs* (1989) 169 CLR 379, 429 (Austl.) (opinion of McHugh J.) (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)); *Refugee Appeal No. 71404/99* [1999] NZRSAA at [26-27] (N.Z.).

2. JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 115 (2d ed. 2014).

3. U.N. HIGH COMM'R FOR REFUGEES [UNHCR], UNHCR STATEMENT ON SUBSIDIARY PROTECTION UNDER THE EC QUALIFICATION DIRECTIVE FOR PEOPLE THREATENED BY INDISCRIMINATE VIOLENCE (Jan. 2008), https://www.unhcr.org/us/media/unhcr-statement-subsidiary-protection-under-ec-qualification-directive-people-threatened.

> may be tempting to dismiss a recognized existing risk as nonetheless "too remote." The Convention [Relating to the Status of Refugees] question is whether the fear is well-founded, and *that* is the context in which remoteness should be considered. *The temporal dimension is not a separate issue, but central to the assessment*; a judgement is called for, which alternative terminology, such as "imminence," rarely clarifies and frequently distorts.[4]

However, there has been a creeping, albeit inconsistent, trend for decision-makers in some contexts to use "time" as an explicit and separate factor in assessing the plausibility of a claim and even the credibility of an applicant.[5] This Article represents the culmination of a multi-year research project that examined how notions of time shape international protection claims[6]—in particular, the immediacy or "imminence" of risk. The inquiry was sparked by our observation that a poorly articulated, inconsistently applied, and little understood notion of imminence was inappropriately being applied in some protection cases (such as fear of return to the *anticipated* impacts of climate change) to limit states' *non-refoulement* obligations under international refugee law and international human rights law—that is, the obligations not to remove persons to any place where they face a real risk of persecution or other serious harm.[7] As part of this analysis, we sought to better understand the role of "imminence" in international law more generally to see whether this could—and should—shape the development of international protection for people on the move.

This Article synthesizes our research findings.[8] It proceeds in two parts. First, it surveys (in Part II) how "imminence" is understood in

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4. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 619 (4th ed. 2021) (emphasis added).

5. Examples of this phenomenon are discussed in Adrienne Anderson, Michelle Foster, Hélène Lambert, & Jane McAdam, *Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection*, 68 INT'L & COMPAR. L. Q. 111, 123-135 (2019) [hereinafter Anderson et al., 2019].

6. By "international protection claims," we mean cases where the principle of *non-refoulement* is invoked to preclude removal. On time, see Jean-François Durieux, *Protection Where?—or When? First Asylum, Deflection Policies and the Significance of Time*, 21 INT'L J. REFUGEE L. 75, 75 (2009) ("[T]emporal connotations pervade the regime's norms and processes, from the concept of emergency through *temporary* protection; *first* asylum; *cessation* of status; etc., to *durable* solutions.").

7. The principle of *non-refoulement* is the cornerstone of the international protection regime. *See, e.g.*, Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; International Covenant on Civil and Political Rights arts. 6-7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

8. *See* Anderson et al., 2019, *supra* note 5; Adrienne Anderson, Michelle Foster, Hélène Lambert, & Jane McAdam, *A Well-Founded Fear of Being Persecuted . . . But When?*, 42 SYDNEY L. REV. 155 (2020)

different areas of international law, such as self-defense, peacekeeping, international environmental law, and international human rights law, the latter both in the context of positive obligations, such as the duty to prevent violations of the right to life, as well as in procedural contexts, such as the admissibility of claims before treaty bodies. This part of the Article reveals how elusive the term "imminence" is: it lacks coherence, is used descriptively rather than analytically, and at times even encompasses notions that go far beyond its "ordinary meaning."[9] "Imminence" can have both a *temporal meaning*—in the sense of something being immediate or proximate in time—and a *non-temporal* meaning—to describe harm (or a risk of harm) as acute or probable, whether arising from a single event or as part of an ongoing condition. As such, the term eludes common definition and exemplifies the problem of fragmentation in international law. This analysis provides important context for Part III of the Article, which explores how these different meanings of imminence (temporal and non-temporal) have been used in two illustrative contexts: (1) protection from the (future) impacts of disasters and climate change; and (2) protection of children from climate-related harm. While the cases are examined thematically, there are obvious overlaps—especially given the pending advisory opinions by the International Court of Justice[10] and the Inter-American Court of Human Rights,[11] whose focus includes "involuntary human mobility"[12] and the rights of "peoples and individuals of the present *and future generations* affected by the adverse effects of climate change."[13] Drawing on illustrative examples, this part of the Article shows how "imminence" is increasingly being (mis)used by courts and

[hereinafter Anderson et al., 2020]; Michelle Foster, Hannah Gordon, Hélène Lambert, & Jane McAdam, *"Time" in Refugee Status Determination in Australia and the United Kingdom: A Clear and Present Danger from Armed Conflict?*, 34 INT'L J. REFUGEE L. 163 (2022); Michelle Foster & Jane McAdam, *Analysis of "Imminence" in International Protection Claims:* Teitiota v New Zealand *and Beyond*, 71 INT'L & COMPAR. L. Q. 975 (2022) [hereinafter Foster & McAdam, 2022].

9. In some contexts, rather than implying immediacy, it connotes grave danger, serious harm, or acute risk.

10. G.A. Res. 77/276, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (Mar. 29, 2023) [hereinafter *Request for an Advisory Opinion*, ICJ, Mar. 29, 2023].

11. On January 9, 2023, the Republic of Chile and the Republic of Colombia submitted to the Secretariat of the Inter-American Court of Human Rights a request for an advisory opinion regarding the "Climate Emergency and Human Rights." Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Columbia and the Republic of Chile, Advisory Opinion OC-32, Inter-Am. Ct. H.R. (Jan. 9, 2023), https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf [hereinafter *Request for an Advisory Opinion*, Inter-Am. Ct. H.R., Jan. 9, 2023].

12. *Id.* at 13.

13. *Request for an Advisory Opinion*, ICJ, Mar. 29, 2023, *supra* note 10, at 3 (emphasis added).

tribunals to deny protection to people fearing future harm. The absence of an agreed meaning of "imminence" in international law more generally (as set out in Part II) only exacerbates the problem of its incoherent interpretation and application in these more specific contexts.[14] Part IV concludes by showing why the longer timeframe inherently required to assess international protection claims in the context of climate-related harm can—and should—inform the development of states' protection obligations, especially in relation to children. In our view, foreseeability or reasonable certainty is the correct analytical framework when assessing states' international protection obligations because to wait for a risk of future (and reasonably certain) harm to become immediate would considerably undermine the principle of *non-refoulement* and the overall purpose of international protection.

II. Imminence in Diverse International Law Contexts

As a body of law, international law has no clear conceptual tools for understanding "imminence." The notion has developed in an ad hoc way through different subfields of international law that are not necessarily transposable. When it comes to assessing whether an individual is in need of international protection, there is a risk that if decision-makers borrow from other subfields in which imminence plays a different role or purpose, they may inappropriately transpose rules and standards.

"Imminence" is usually understood in terms of time; that is, *when* harm is likely to occur. In common parlance in English, "imminent" means "coming or likely to happen very soon"[15]—but the word may have slightly different connotations in other languages, thus affecting how decision-makers understand and use it.[16] In international law, "imminence" is a key element of the law on the use of force in self-defense by states, where an "imminent" threat of attack may justify the

14. *See AW (Kiribati)* [2022] NZIPT 802085 at [101-15] (N.Z.) [hereinafter *AW (Kiribati)*]; Foster & McAdam, 2022, *supra* note 8, at 977.

15. *Imminent*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/imminent (last visited Mar. 6, 2025).

16. We thank participants in the Hertie School's Centre for Fundamental Rights Research Colloquium (Mar. 27, 2024) for raising this issue. For instance, Valentin Feneberg notes that Germany's Federal Administrative Court uses "foreseeable" synonymously with "strong imminence." Valentin Feneberg, *Money, Not Protection. Assisted Return Programmes and the Timing of Future Harm in Judicial Refugee Status Determination*, J. Ethnic & Migration Studs. (forthcoming 2025), https://doi.org/10.1080/1369183X.2025.2459100. This is not just an issue for national courts; members of U.N. treaty bodies, for example, may use the same English word but understand it to mean different things.

use of preemptive self-defense by a state.[17] In international environmental law, "imminence" encompasses the *probability* and/or *seriousness* of future harm as well. For instance, the precautionary principle provides that "full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" where "threats of serious or irreversible damage" exist.[18] Imminence has also gained significant traction in other areas, such as the protection of civilians, the assessment of states' positive human rights obligations in preventing risks to life, and admissibility before an international and regional human rights bodies.

This part briefly examines the meaning of "imminence" in these various areas of law before considering its use—and (mis)use—in the context of international protection. We make two points: first, that a non-temporal meaning of "imminence" is not unusual in law, and second, that "imminence" can be used to describe both a one-off threat and an ongoing, continuous threat. Hence, imminence is intrinsically an ambiguous term, best replaced in a legal context with more precise language. In essence, this discussion is not to (in)validate the use of imminence in the law on international protection but rather to warn against the temptation of transposing it from other contexts (even unconsciously), given important differences in assessment criteria.

A. *Self-defense*

Customary international law has long required that a threat be imminent for anticipatory force used by states in self-defense to be lawful.[19] For centuries, an "imminent" threat in this context meant a threat that

17. *Correspondence Between Great Britain and the United States, Respecting the Destruction of the Steamboat* Caroline*—July, August, 1842*, 30 BRIT. & FOREIGN STATE PAPERS 193, 195-96 (1858) [hereinafter *Caroline* case 1842 Correspondence].

18. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, princ. 15, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992) [hereinafter Rio Declaration].

19. *Correspondence Between Great Britain and the United States, Respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat* Caroline*—March, April, 1841*, 29 BRIT. & FOREIGN STATE PAPERS 1126, 1137-38 (1857) [hereinafter *Caroline* case 1841 Correspondence]. Such use of force is legal when the necessity is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." *Caroline* case 1842 Correspondence, *supra* note 17, at 195-96. See further for discussion of the Caroline incident, the correspondence of U.S. Secretary of State Webster with his British counterpart, and the doctrine of anticipatory self-defense, as elucidated by Grotius, Pufendorf, and Vattel: Dominika Švarc, *Redefining Imminence*, 31 ILSA J. INT'L & COMPAR. L. 171, 178-83 (2006).

was "immediate and certain,"[20] in the sense of being concrete or "just about to materialize" based on "verifiable facts."[21] In such circumstances, a lawful armed response demanded that the threat be necessary and proportionate.[22]

However, since the 9/11 attacks on the United States, "imminent" threat has taken on a new meaning: it can also be "a continuous threat that emanated from the very nature of a terrorist," irrespective of specific activities (needing corroborative evidence) and irrespective of time (since the threat is an ongoing one).[23] Any force used to prevent a future attack would be considered as preventive, rather than anticipatory or preemptive. As Vasia Badalič explains, "[t]he new meaning of the term 'imminence' altered the concept of imminent threat by including in it non-immediate threats that were expected to emerge at some unspecified time in the future."[24] This, in turn, has an effect on the certainty of the threat since "immediacy and certainty are closely interlinked" in that "[l]ess immediacy . . . usually means less certainty."[25]

Thus, the notion of imminence in the context of self-defense remains contested.[26] Some scholars still maintain that force may be used in self-defense "only if an armed attack occurs"; in such a circumstance, the threat and harm manifest simultaneously.[27] For others, such force can be used against an imminent attack (with imminent used "as

20. Michael N. Schmitt, *Preemptive Strategies in International Law* 24 MICH. J. INT'L L. 513, 533 n. 63 (2003) (citing 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE THREE BOOKS] 173-75 (James Brown Scott ed., Francis W. Kelsey trans., Carnegie Endowment for International Peace 1925) (1625)).

21. Vasja Badalič, *The War Against Vague Threats: The Redefinitions of Imminent Threat and Anticipatory Use of Force*, 52 SEC. DIALOGUE 174, 177 (2021).

22. The use of force, "justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." *See Caroline* case 1841 Correspondence, *supra* note 19, at 1138.

23. Badalič, *supra* note 21, at 180. *See also* Christopher Greenwood, *International Law and the Preemptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L. J. 7, 10 (2003) (arguing that when a threat is grave and the technology involved is capable of devastating effect, then an attack does not need to be temporally near in time).

24. Badalič, *supra* note 21, at 180.

25. *Id.*

26. As Bethlehem has noted, there is "little scholarly consensus on what is properly meant by 'imminence' in the context of contemporary threats." Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 773 (2012). Because of this, the notion "needs to be further refined and developed." Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 103 AM. J. INT'L L. 563, 564 (2013).

27. Badalič, *supra* note 21, at 175-76.

a limiting criterion").[28] Within this latter group of scholars, some use imminence as a "temporal criterion" ("an imminent armed attack is one that is *about to occur*," i.e., the threat and harm occur almost simultaneously).[29] Others view it as "an aspect of the necessity of self-defence . . . [that] contains elements of causality and intention" ("an imminent attack is one that *will* occur in the ordinary course of events, and it is *necessary* to act now to deflect it"; i.e., the threat is ongoing, and harm can therefore happen anytime).[30] In this second understanding, imminence has more to do with the "*last possible window of opportunity*"—a threat is still imminent even if not immediate, and now is the last opportunity when it can be neutralized.[31] An example would be if intelligence revealed that terrorists, whose whereabouts were known, were planning an attack, the precise timing of which was unknown: now would be the last possible window of opportunity to strike them before they disappeared.[32]

Even if the meaning of imminence in this context were precise and clearly established, it would still be important to reflect on the different underlying purposes of the law regulating the use of force on the one hand and refugee law on the other. In the former context, the notion of imminence was introduced to permit what would otherwise constitute unlawful conduct, namely the use of force. In such a context, there is a need to circumscribe closely the circumstances in which certain action is permitted. Despite its flaws, imminence thus bears some logical connection to the law's purpose in that context. It does not follow, however, that a test appropriate in the context of assessing state accountability for prima facie unlawful conduct is relevant or appropriate in the context of international protection. This is even more so when it has proven to be unstable and uncertain as a guiding principle.

B. *Peacekeeping and the Protection of Civilians*

The language of imminence is also used in the context of the protection of civilians in armed conflict. The original protection language of United Nations peacekeeping operation mandates was limited to civilians

28. Marko Milanovic, *When Did the Armed Attack Against Ukraine Become "Imminent"?*, EJIL:TALK! (Apr. 20, 2022), https://www.ejiltalk.org/when-did-the-armed-attack-against-ukraine-become-imminent.

29. *Id.* (emphasis in original).

30. *Id.* (emphasis in original).

31. Schmitt, *supra* note 20, at 535 (emphasis in original).

32. We are grateful to Professor Ben Saul for his insight on this point.

"under imminent threat of physical violence."[33] However, this language was later removed from peacekeeping operation mandates to smooth the way for more preventive actions.[34] This is seen in peacekeeping mandates in the Central African Republic, Mali, the Democratic Republic of the Congo, and Darfur, which all include provisions for the protection of refugees and internally displaced persons.[35] However, an "imminent threat of physical violence" is still required in peacekeeping mandates in Haiti, Lebanon, and Abyei.[36] As a result, Mona Ali Khalil argues that far from removing the confusion generated by the lack of a clear understanding of what constitutes an "imminent threat,"[37] there is now a different confusion resulting from two separate mandates within peacekeeping operations.[38] Moreover, it is instructive to reflect on the rationale for invoking imminence. The peacekeeping context is effectively one that permits international intervention in the affairs of another state and thus, at least in some form, infringes on state sovereignty.[39] There is a strong imperative in such a case for the law to encapsulate concepts that stringently limit the conduct permitted. Even in that context, where imminence may have some justifiable role, it has proven problematic. Once again, this cautions against transposition into the fundamentally different context of international protection.

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33. Mona Ali Khalil, *Legal Aspects of the Use of Force by United Nations Peacekeepers for the Protection of Civilians, in* PROTECTION OF CIVILIANS 205, 208 (Haidi Willmot et al. eds., 2016). *See also id.* at 211. This was first used in October 1999 in U.N. Security Council Resolution S.C. Res. 1270, ¶ 14 (Oct. 22, 1999) (Sierra Leone).

34. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS. (OCHA), BUILDING A CULTURE OF PROTECTION: 20 YEARS OF SECURITY COUNCIL ENGAGEMENT ON THE PROTECTION OF CIVILIANS 41 (2019) [hereinafter OCHA Paper]. *See also* U.N. DEP'T OF PEACE OPERATIONS, THE PROTECTION OF CIVILIANS IN UNITED NATIONS PEACEKEEPING HANDBOOK, ¶ 2.1.1 (2020).

35. *See, e.g.*, S.C. Res. 1706, ¶ 12(a) (Aug. 31, 2006) (Darfur); S.C. Res. 1769, ¶ 15(a)(ii) (July 31, 2007) (Darfur); S.C. Res. 2149, ¶ 30(a)(i) (Apr. 10, 2014) (Cen. Afr. Rep.); S.C. Res. 2162, ¶ 19(a)(i) (June 25, 2014) (Côte d'Ivoire); S.C. Res. 2147, ¶ 4(a)(i) (Mar. 28, 2014) (Dem. Rep. Congo), as cited in Scott Sheeran & Catherine Kent, *Protection of Civilians, Responsibility to Protect, and Humanitarian Intervention: Conceptual and Normative Interactions, in* PROTECTION OF CIVILIANS 29, 45 n. 138 (Haidi Willmot et al. eds., 2016).

36. OCHA Paper, *supra* note 34, at 41-43.

37. According to the U.N. Secretariat, the term "imminent" necessitated "actual or guaranteed attacks on civilians to trigger the mandate," whereas under the Rules of Engagement "only a reasonable belief in the hostile intent is required." *See* Khalil, *supra* note 33, at 211.

38. *Id.*

39. This is particularly acute in situations where the main parties are internally divided and/or operating in a volatile environment, and where hence the three basic principles of peacekeeping ("consent of the parties," "impartiality," and "non-use of force except in self-defence and defence of the mandate") are being challenged. *See Principles of Peacekeeping*, U.N. PEACEKEEPING (Oct. 21, 2017), https://peacekeeping.un.org/en/principles-of-peacekeeping.

C. *International Environmental Law*

Probability of harm and timing of harm are important concepts in international environmental law, a branch of law largely preoccupied with the prevention of future, often uncertain, environmental harms. Unlike the two contexts considered thus far, which are concerned with authorizing the use of force, this body of law has a preventive purpose. The precautionary principle, in essence, calls for: (1) preventive action where a risk is known but the probability of occurrence is uncertain; and (2) precautionary action where the consequences and the probability of occurrence are uncertain.[40] The principle is "deliberately flexible so as to encompass diverse circumstances,"[41] and while the threshold varies across different instruments, there must be at least "reasonable grounds for concern" that harm may occur, meaning more than a theoretical possibility but "less than proof of probability of harm."[42] The key question, therefore, is not about the imminence of risk in a temporal sense (since risk can be short-term or long-term), but whether there exists a "threat of serious or irreversible damage"; [43] this question is one of evidence. Is risk reasonably foreseeable based on the available evidence?

In that sense, the precautionary principle resonates with the question in international protection cases as to whether protection should be forthcoming, notwithstanding the difficulty of knowing if and when harm will materialize. As Jacqueline Peel notes,

> [T]he international community may have a lower tolerance for uncertainty where there are threats of catastrophic or irreversible harm, but a higher tolerance where threats are less serious,

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40. Rio Declaration, *supra* note 18, princ. 15.

41. ALINE L. JAECKEL, THE INTERNATIONAL SEABED AUTHORITY AND THE PRECAUTIONARY PRINCIPLE: BALANCING DEEP SEABED MINERAL MINING AND MARINE ENVIRONMENTAL PROTECTION 27 (2017) (citing Elizabeth Fisher, Judith Jones, & Rene von Schomberg, *Implementing the Precautionary Principle: Perspectives and Prospects, in* IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: PERSPECTIVES AND PROSPECTS 1, 5 (Elizabeth Fisher et al. eds., 2006)). *See generally* David Freestone, *International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle, in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 135 (Alan Boyle & David Freestone eds., 2001).

42. Jaeckel, *supra* note 41, at 39 (citing ARIE TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES 118-19 (2006)).

43. Rio Declaration, *supra* note 18, princ. 15; U.N. Framework Convention on Climate Change art. 3(3), May 9, 1992, 1771 U.N.T.S. 107. *Accord* U.N. Conf. on Env't and Dev., *Action for a Common Future: Report of the Economic Commission for Europe on the Bergen Conference*, ¶ 7, U.N. Doc. A/CONF.151/PC/10, annex I (Aug. 6, 1990); *cf.* THE EARTH CHARTER princ. 6 (2000). *See also Principle Seven: Environment*, U.N. GLOB. COMPACT (July 26, 2000), https://unglobalcompact.org/what-is-gc/mission/principles/principle-7.

> potentially reversible, or offset by other benefits. . . . These factors point to the importance in understanding and applying precaution as part of a holistic assessment of threats and uncertainty.[44]

As such, how it is applied in a particular case "will vary depending on the nature of the threats at issue and the degree of scientific uncertainty surrounding those threats."[45] The important point here is that the precautionary principle, which inherently accepts uncertainty, is consistent with refugee law's test of foreseeability of the risk of harm (as will be discussed in Section II.F, below).

D. *Positive Obligations Under Human Rights Law: The Duty to Prevent Violations of the Right to Life*

States' positive obligations to take appropriate steps to protect the lives of those within their jurisdiction against a "real and immediate risk" or a "real and imminent danger" have been articulated in the jurisprudence of international human rights bodies and regional courts for some time ("the *Osman* duty").[46] Positive obligations can entail a range of duties of both substantive and procedural character.

For instance, in the context of a foreseeable disaster, the European Court of Human Rights (ECtHR) found that a failure to take necessary steps to mitigate that disaster constituted a violation of Article 2 of the European Convention on Human Rights (ECHR).[47] In that case, *Budayeva v. Russia*, Russia had failed to take appropriate action despite warnings of mudslides. As discussed below, the Court recently extended this analysis to state "action and/or inaction in the context of climate

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44. Jacqueline Peel, *Precaution*, *in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 302, 305 (Lavanya Rajamani & Jacqueline Peel eds., 2021).

45. *Id.* at 311 (citing PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 239-40 (4th ed. 2018)).

46. Osman v. United Kingdom, App. No. 23452/94, 29 Eur. H.R. Rep. 245, 305 (1998). *Accord* Kaya v. Turkey, 2000-III Eur. Ct. H.R. 149, 177 (2000). The "*Osman* test" was transposed in the jurisprudence of the Inter-American Court of Human Rights. *See* Pueblo Bello Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 123 (Jan. 31, 2006) ("awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger.").

47. Budayeva v. Russia, 59 Eur. Ct. H.R. 59, 88-89 (2008). The ECtHR indicated that states have a wider margin of appreciation when it comes to harm related to natural rather than human-made hazards. *Id.* at 85-86. *See generally* Bruce Burson, Walter Kälin, Jane McAdam, & Sanjula Weerasinghe, *The Duty to Move People Out of Harm's Way in the Context of Climate Change and Disasters*, 37 REFUGEE SURV. Q. 379 (2018).

change" that creates a "real and imminent" risk to life.[48] The Court has explained that states have a duty "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life."[49] They must "take regulatory measures and . . . adequately inform the public about any life threatening emergency."[50] Any such obligation "must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake," such as the operation of waste collection sites.[51] In the sphere of emergency relief, the ECtHR will be particularly vigilant concerning states' obligations to mitigate natural hazards, especially where the circumstances point "to the imminence of a natural hazard that had been clearly identifiable" and the hazard is recurrent.[52]

However, the meaning of "immediate" or "imminent" in this context remains imprecise. For instance, Vladislava Stoyanova observes that in some cases, the court has required a sense of urgency or immediacy, while in others, it has allowed a much longer timeframe—nearly two years, in the case of *Öneryıldız v. Turkey*.[53] In 2012, the Supreme Court of the United Kingdom was asked to consider the meaning in determining whether the *Osman* duty (to protect against an immediate and real risk) applied to an informal patient (a woman who had committed suicide while on home leave from a mental health unit).[54] The court's discussion of the meaning of "immediate" (as "present and continuing") set the test used in later human rights duties cases in the United Kingdom.[55] Interestingly, the respondent argued that "immediate" was a synonym for "imminent," but the court preferred a different meaning:

> As for whether the risk was "immediate", Miss Carss-Frisk submits that the Court of Appeal failed to take into account the fact that an "immediate" risk must be imminent. She derives the word "imminent" from what Lord Hope said in *Van Colle v*

48. Verein Klimaseniorinnen Schweiz v. Switzerland, App. No. 53600/20, ¶ 511 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206.

49. *Id.* ¶ 313.

50. *Budayeva,* 59 Eur. Ct. H.R. at 85.

51. Öneryildiz v. Turkey (No. 2), 41 Eur. Ct. H.R. 325, 355 (2004).

52. *Budayeva,* 59 Eur. Ct. H.R. at 86.

53. See discussion in Vladislava Stoyanova, *Fault, Knowledge and Risk within the Framework of Positive Obligations Under the European Convention on Human Rights*, 33 LEIDEN J. INT'L L. 601, 612-15 (2020) (citing *Öneryildiz*, 41 Eur. H.R. Rep. at 362).

54. Rabone v. Pennine Care NHS Found. Trust [2012] UKSC 2, [1] (appeal taken from Eng.) (U.K.).

55. *Id.* at [39].

> *Chief Constable of the Hertfordshire Police* [2009] 1 AC 225, para 66. In the case of *In re Officer L* [2007] 1 WLR 2135, para 20, Lord Carswell stated that an apt summary of the meaning of an "immediate" risk is one that is "present and continuing". In my view, one must guard against the dangers of using other words to explain the meaning of an ordinary word like "immediate". But I think that the phrase "present and continuing" captures the essence of its meaning. The idea is to focus on a risk which is present at the time of the alleged breach of duty and not a risk that will arise at some time in the future.[56]

Other regional and international human rights bodies eschewed the imprecision and potentially unduly constraining nature of this language. The Inter-American Court of Human Rights' 2017 Advisory Opinion on the Environment and Human Rights is instructive in that it draws on the precautionary principle in elucidating the scope of positive state obligations in human rights law. It stated,

> [T]he general obligation to ensure the rights to life and to personal integrity means that States must act diligently to prevent harm to these rights (*supra* para. 118). Also, when interpreting the Convention, as requested in this case, the Court must always seek the "best perspective" for the protection of the individual (*supra* para. 41). Therefore, the Court understands that *States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty.* Consequently, States must act with due caution to prevent possible damage. Thus, in the context of the protection of the rights to life and to personal integrity, the Court considers that States must act in keeping with the precautionary principle. Therefore, even in the absence of scientific certainty, they must take "effective" measures to prevent severe or irreversible damage.[57]

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56. *Id.* at [39]. The "present and continuing test" first appeared in the Northern Ireland case of *In re* Application by "W" for Judicial Review [2004] NIQB 67, [17] (appeal taken from N. Ir.) (U.K.), and the notion of "real and immediate risk" was expanded on in *In re* Officer L [2007] UKHL 36 (appeal taken from N. Ir.) (U.K.).

57. The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser.

This opinion suggests that, in line with the court's understanding of environmental law, action is required not based on imminence (in the sense of timing), but where there are "plausible indications" that a serious violation of rights is at risk. A lack of certainty does not negate the overriding principle of precaution.

Until the 2024 decision of the ECtHR in *Verein Klimaseniorinnen Schweiz v. Switzerland*,[58] neither that Court nor the Inter-American Court of Human Rights had clearly sought to define "immediate" or "imminent" as a necessary criterion for triggering state responsibility. Instead, both had dealt with real and immediate risk or real and imminent danger "in a joint manner" and had been "prepared to construe the 'immediacy' criterion in a flexible manner depending on the specific context of the case."[59]

In *Verein Klimaseniorinnen Schweiz*, the Grand Chamber of the ECtHR appeared to adopt a more precautionary approach. In reflecting on relevant interpretative principles, it reiterated that ECHR rights "can and must be influenced both by factual issues and developments affecting the enjoyment of the rights in question and also by relevant legal instruments designed to address such issues by the international community."[60] In particular, the ECHR should be interpreted "as far as possible, in harmony with other rules of international law," citing the Paris Agreement as an example.[61] The Court explained that while it was "impossible to devise a general rule on what constitutes a 'real and imminent' risk to life," its past jurisprudence suggested that "the term 'real' risk corresponds to the requirement of the existence of a serious, genuine and sufficiently ascertainable threat to life,"[62] while the "'imminence' of

A) No. 23, ¶ 180 (Nov. 15, 2017) (emphasis added) (citations omitted). It noted, however, that the precautionary approach usually makes measures contingent on their cost-effectiveness, such that developed states may be held to a higher standard. *Id.* n. 425.

58. *See generally*, Verein Klimaseniorinnen Schweiz v. Switzerland, App. No. 53600/20 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206.

59. Franz Christian Ebert & Romina I. Sijniensky, *Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the* Osman *Test to a Coherent Doctrine on Risk Prevention?*, 15 HUM. RTS. L. REV. 343, 359-60 (2015).

60. *Verein Klimaseniorinnen Schweiz,* App. No. 53600/20, ¶ 455.

61. *Id.* ¶¶ 455-56 (referring to Report of the Conference of the Parties on its Twenty-First Session, Held in Paris from 30 November to 13 December 2015, at 21, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016)).

62. *Verein Klimaseniorinnen Schweiz*, App. No. 53600/20, ¶ 512 (referring to Fadeyeva v. Russia, App. No. 55723/00 (Oct. 16, 2003) https://hudoc.echr.coe.int/eng?i=001-23476, and Brincat v. Malta, App. Nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, ¶¶ 82-84 (Jul. 24, 2014), https://hudoc.echr.coe.int/fre?i=001-145790).

such a risk entails an element of [both the] physical proximity of the threat . . . and its temporal proximity."[63]

In the context of state (in)action concerning climate change—where there is "a grave risk of inevitability and irreversibility of the adverse effects of climate change, the occurrences of which are most likely to increase in frequency and gravity"—the Court said that the "'real and imminent' test may be understood as referring to a *serious, genuine and sufficiently ascertainable threat* to life, containing *an element of material and temporal proximity of the threat to the harm* complained of by the applicant."[64]

The Court emphasized that "the notion of imminent harm or danger," in particular,

> cannot be applied without properly taking into account the specific nature of climate change-related risks, including their potential for irreversible consequences and corollary severity of harm. Where future harms are not merely speculative but real and highly probable (or virtually certain) in the absence of adequate corrective action, *the fact that the harm is not strictly imminent should not, on its own, lead to the conclusion that the outcome of the proceedings would not be decisive for its alleviation or reduction.* Such an approach would unduly limit access to a court for many of the most serious risks associated with climate change.[65]

Two years earlier, the U.N. Human Rights Committee in *Billy v. Australia* emphasized that in the context of mitigation and adaptation measures to prevent "negative climate change impacts,"[66] "the obligation of States parties to respect and ensure the right to life extends to *reasonably foreseeable threats* and life-threatening situations that can result in loss of life."[67] It found that "environmental degradation, climate change and unsustainable development constitute some of the *most pressing and serious threats to the ability of present and future generations to enjoy the right to life*."[68]

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63. *Verein Klimaseniorinnen Schweiz*, App. No. 53600/20, ¶ 512 (referring to Kolyadenko v. Russia, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, and 35673/05, ¶¶ 150-55 (Feb. 28, 2012), https://hudoc.echr.coe.int/eng?i=001-109283 (on physical proximity) and *Brincat*, App. Nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, ¶ 84 (on temporal proximity)).

64. *Verein Klimaseniorinnen Schweiz*, App. No. 53600/20, ¶ 513 (emphasis added).

65. *Id.* ¶ 614 (emphasis added).

66. Hum. Rts. Comm., Billy v. Australia, Communication No. 3624/2019, ¶ 8.2, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 18, 2023).

67. *Id.* ¶ 8.2 (emphasis added).

68. *Id.* (emphasis added).

Moreover, states parties are obliged to "take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying the right to life with dignity."[69]

It is notable that the doctrine here moved away from notions of imminence to focus instead on foreseeability. Although the ECtHR has continued to use the language of imminence (rather than foreseeability), these two recent cases (*Billy* and *Verein Klimaseniorinnen Schweiz*) can be viewed as representing a more precautionary approach, even in a context that involves adjudication of state accountability. In our view, this provides further grounds for skepticism about the usefulness of the notion of imminence in international law—in any context.

E. *Procedural Issues in International Human Rights Law: Imminence in Admissibility Decisions/Standing*

The final area in which the language of imminence has been invoked is in the assessment of the admissibility of human rights complaints. For a claim to be admissible before a regional human rights court or an international treaty body, an individual must show that they are the victim of a violation under the instrument in question, such as the International Covenant on Civil and Political Rights (ICCPR).[70] This means that the violation, such as an expulsion order in force,[71] must actually affect the individual.[72] In 1993, the U.N. Human Rights Committee introduced a further gloss on this test by stating that to be a victim, a person "must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent."[73] This test was restated word for word a few years later by the Committee in *Aalbersberg v. Netherlands*.[74] The underlying assumption behind the requirement that a person be a victim before they can lodge an application/have

69. *Id.* Note that the case against Australia was not made out with respect to the right to life but was successful on other grounds.

70. ICCPR, *supra* note 7, arts. 6-7.

71. *See e.g.*, Comm. Against Torture, A.D. v. Netherlands, Communication No. 96/1997, ¶¶ 6.2, 7.3, U.N. Doc. CAT/C/23/D/96/1997 (Nov. 7, 1999).

72. *See e.g.*, Hum. Rts. Comm., Aumeeruddy-Cziffra v. Mauritius, Communication No. 35/1978, ¶ 9.2, U.N. Doc. CCPR/C/OP/1 (1984). *See also* Hum. Rts. Comm., E.P. v. Colombia, Communication No. 318/1988, ¶ 8.2., U.N. Doc. CCPR/C/39/D/318/1988 (Aug. 15, 1990).

73. Hum. Rts. Comm., E.W. v. Netherlands, Communication No. 429/1990, ¶ 6.4, U.N. Doc. CCPR/C/47/D/429/1990 (Apr. 8, 1993) (emphasis added).

74. Hum. Rts. Comm., Aalbersberg v. Netherlands, Communication No. 1440/2005, ¶ 6.3, U.N. Doc. CCPR/C/87/D/1440/2005 (Aug. 14, 2006).

standing is to avoid the prospect of an international or regional adjudicatory body having to deal with hypothetical situations.[75]

On occasion, this timeframe was stretched to include consideration of whether someone would be affected imminently, although this was not made out in any of the relevant cases.[76] As we have argued elsewhere, it is one thing to introduce a notion of imminence in the limited and discrete context of admissibility, but it is quite another to conflate admissibility and substantive issues and require that a person be at "real risk and imminent risk" of violations of their human rights.[77] In none of these decisions was the meaning of "imminent" explained, although a temporal meaning is most probable.

Concerningly, there has been some conflation of these tests.[78] In *AF (Kiribati)*, the New Zealand Immigration and Protection Tribunal (IPT) appeared to transplant the imminence test from *Aalbersberg* into its substantive consideration of whether removal would expose an appellant to a real risk of harm. In dismissing the claim, the IPT noted,

> A further reason why the appellant's claim under this aspect of section 131 must fail is that he cannot establish that there is a sufficient degree of risk to his life, or that of his family, at the present time. The case law of the Committee requires that, to be a victim for the purposes of bringing a complaint under the First Optional Protocol, the risk of violation of an ICCPR right must be "imminent". In *Aaldersberg* [*sic*] *and ors v Netherlands* CCPR/C/87/D/1440/2005 (14 August 2006), a complaint was made by over 2,000 Dutch citizens that Dutch law, which recognised the lawfulness of the potential use of nuclear weapons, put their and many others lives at risk.[79]

While the IPT explained that "[i]mminence should not be understood as imposing a test which requires the risk to life be something

75. *E.g.*, H v. Norway, App. No. 51666/13, ¶ 8 (Feb. 17, 2015) https://hudoc.echr.coe.int/eng?i=001-153117.

76. *See* E.W. v. Netherlands, ¶ 6.4, U.N. Doc. CCPR/C/47/D/429/1990; *Aalbersberg*, ¶ 6.3, U.N. Doc. CCPR/C/87/D/1440/2005; H. v. Norway, App. No. 51666/13, ¶ 8. For more cases on this point, see Anderson et al., 2019, *supra* note 5, at 125-26.

77. Anderson et al., 2019, *supra* note 5, at 127. *See also* Hum. Rts. Comm., Khan v. Canada, Communication No. 1302/2004, ¶ 5.4, U.N. Doc. CCPR/C/87/D/1302/2004 (Aug. 6, 2006); Hussein v. Netherlands, App. No. 27725/10, ¶ 78 (Apr. 2, 2013) https://hudoc.echr.coe.int/eng?i=001-118927. For more cases on this point, see Anderson et al., 2019 *supra* note 5, at 128.

78. *See* Anderson et al., 2019, *supra* note 5; Foster & McAdam, 2022, *supra* note 8, at 977.

79. *AF (Kiribati)* [2013] NZIPT 800413 at [89] [hereinafter *AF (Kiribati)*].

which is, at least, likely to occur,"[80] the introduction of this notion created the potential for misapplication and misunderstanding in later cases, which is, indeed, what occurred.[81] In subsequent (extra-curial) comments, the decision-maker acknowledged that "it seems clear that [imminence] contemplates a more immediate band of future time for the qualifying harm to arise than that which may satisfy the real chance or risk threshold for the purposes of RSD [(refugee status determination)]."[82] And in a subsequent decision, he clarified that "imminence, conceptually, is linked to the threshold admissibility status of victimhood, but that is all. Once that threshold is crossed, it is the ordinary standard of risk (in New Zealand, a 'real chance'/being 'in danger') which is operative."[83]

F. *Summary*

This overview of "imminence" reveals that there exists no clear legal understanding of the term, whether in the context of self-defense, U.N. peacekeeping operations, international environmental law, or international human rights law. Nevertheless, it is generally understood to include a temporal element (the immediacy of the threat necessitating an impending response) as well as a non-temporal element relating to the wider elements of the threat, such as its nature and likelihood.[84] In addition, the rationale for introducing a test of imminence is intimately tied to the underlying purpose of the relevant area of law, meaning that transposition across areas with different underlying objectives may be problematic. The problems inherent in a purely temporal interpretation of imminence are usefully summarized by Mark L. Rockefeller as follows: "if the future harm can be known with reasonable certainty, and waiting until that harm is immediate would increase the harm itself, one should be justified in acting early to prevent such harm."[85] In our view, this statement is highly relevant to the predicament of people

80. *Id.* at [90].

81. *See* Foster & McAdam, 2022, *supra* note 8, at 978.

82. Bruce Burson, The Concept of Time and the Assessment of Risk in Refugee Status Determination: Presentation to the Kaldor Centre Annual Conference 6 (Nov. 18, 2016), https://events.unsw.edu.au/sites/default/files/2023-10/B_Burson_2016_Kaldor_Centre_Annual_Conference.pdf.

83. *AW (Kiribati)*, *supra* note 14, at [103].

84. Chris O'Meara, *Reconceptualising the Right of Self-Defence against "Imminent" Armed Attacks*, 9 J. on Use of Force & Int'l L. 278, 296 (2022).

85. Mark L. Rockefeller, *The Imminent Threat Requirement for the Use of Preemptive Military Force: Is It Time for a Non-Temporal Standard?*, 33 Denv. J. Int'l L. & Pol'y 131, 139 (2004).

seeking international protection against future harm, as explored in the next part.

III. Imminence in the International Protection Context

Our extensive analysis of international protection decisions by tribunals and courts in seven jurisdictions,[86] as well as by the ECtHR, the U.N. Human Rights Committee, and the U.N. Committee against Torture, has revealed that courts and tribunals tend to consider the nature, extent, timing, and/or severity of past harm as a guide to assessing: (1) future risk; (2) the extent to which the harm is already manifesting; (3) the degree to which the risk is individualized (or personally targeted); and (4) any evidence that corroborates the anticipated consequences of the harm. Protection claims involving general conditions, such as environmental degradation or generalized violence—and especially those relating to *anticipated* general conditions—are typically rejected because they are not considered to be tied to the individual's particular situation, and there is often no targeted past harm.[87] In this part, we examine two contemporary interrelated contexts in which the issue of imminence—particularly in the sense of timing—has been at issue in international protection cases. In Section III.A, we explore how refugee decision-makers have assessed protection claims concerning climate-related risks, with a focus on past or ongoing harm, "imminence" as timing of harm and future risk, and timeframes and mitigation of the risk of harm. In Section III.B, we discuss more specifically the claims of children in the context of future climate-related harm.

86. Australia, Canada, France, Germany, New Zealand, the United Kingdom, and the United States. For analysis of jurisprudence from international and supranational courts and bodies, see generally Anderson et al., 2020, *supra* note 8.

87. In some cases, such reasoning may be based on misapprehension of a need to show individualized harm in the protection context. This has been the subject of extensive academic and judicial debate, particularly in the EU and the UK in relation to Art. 15(c) of the Qualification Directive: Council Directive, 2011/95/EU, 2011 O.J. (L 377/9) [hereinafter Qualification Directive]. From June 12, 2026, this will be replaced by the Qualification Regulation: Council Regulation, 2024/1347/EU, 2024 O.J. (L series). *See, e.g.*, Hélène Lambert & Theo Farrell, *The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence*, 22 Int'l. J. Refugee L. 237, 243-50, 252-53 (2010); Jane McAdam, *Individual Risk, Armed Conflict and the Standard of Proof in Complementary Protection Claims: The European Union and Canada Compared, in* Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony 59 (James C. Simeon ed. 2010); Case C-465/07, Elgafaji v. Staatssecretaris van Justitie, 2009 E.C.R. I-00921.

A. *Climate Change and Disasters*

The particular focus of our inquiry concerns the most complex factual scenario, namely, the consideration of harm manifesting in the future over an indeterminate period of time. It is now recognized as a matter of legal principle that "the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the [ICCPR], thereby triggering the non-refoulement obligations of sending states" under human rights law,[88] and that disasters and climate change provide a social and political context in which states' *non-refoulement* obligations in refugee law may be engaged.[89] Importantly, people do not have to wait until they face an immediate risk before protection should be forthcoming.[90]

However, uncertainty about how the impacts of climate change will be felt in particular contexts—and experienced by particular individuals—has arguably been elevated in climate cases, such that protection has been denied because harm is not yet "imminent" and other factors could intervene to mitigate it. As we have explained elsewhere, this is an inappropriate standard to apply.[91] While it is reasonable (and routine) in international protection claims to consider whether or not a risk could be mitigated, "[c]ontext is key, and the rules cannot be too prescriptive."[92] As we have argued, "*potential* mitigating developments may not be sufficient to reduce an existing real risk (albeit one that will manifest in the distant future)."[93] And as Valentin Feneberg has added,

88. Hum. Rts. Comm., Teitiota v. New Zealand, Communication No. 2728/2016, ¶ 9.11, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) (emphasis omitted). It is also recognized that in some cases, people may qualify for refugee status under the Refugee Convention, *supra* note 7, read in conjunction with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N. T.S. 267; *AF (Kiribati)*, *supra* note 79, at [55] (reiterated by the N.Z. Supreme Court in *Teitiota v Chief Exec of the Ministry of Bus, Innovation & Emp* [2015] NZSC 107 at [13]); *AC (Tuvalu)* [2014] NZIPT 800517-520 at [70] (N.Z.) [hereinafter *AC (Tuvalu)*].

89. UNHCR, Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters, ¶ 2 (Oct. 1, 2020), https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123356 [hereinafter UNHCR Legal Considerations].

90. *Teitiota*, ¶ 9.11, U.N. Doc. CCPR/C/127/D/2728/2016 ("the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized"). *See also id.* ¶¶ 9.3, 9.6, 9.7; HR 20 december 2019, NJ 2020, 41 ¶ 5.2.2 m.nt. J. Spier (State of the Netherlands/Urgenda Found.) (Neth.) [hereinafter *Urgenda*, Dec. 20, 2019], where immediacy was linked to the harm "directly threatening the persons involved," including over the longer term. For further analysis, see Foster et al., *supra* note 8, at 170-72 and Anderson et al., 2019, *supra* note 5, at 127 (footnote omitted).

91. *Id.*; Foster & McAdam, 2022, *supra* note 8.

92. Anderson et al., 2020, *supra* note 8, at 175.

93. *Id.* at 176 (emphasis in original).

there is nothing to say that a risk will necessarily reduce as time passes—it could increase.[94]

The most focused jurisprudential analysis of climate-related displacement comes from New Zealand; this, in turn, has influenced subsequent deliberations, including by the U.N. Human Rights Committee. These cases have grappled with the extent to which a *future* risk may ground a protection claim *now*. By contrast, most other protection cases that have considered the impacts of disasters, environmental degradation, or climate change have looked at *past* (or ongoing) harm and as an *element* of a protection claim (or even more often, as "relevant background"),[95] rather than as the primary focus. The next subsection begins with an overview of these more numerous cases,[96] as they provide important context to our focused examination of the climate change cases in this part.

1. Past or Ongoing Harm

A study of cases in Austria and Sweden involving past and/or ongoing environmental harm revealed that where removal was precluded—often on exceptional humanitarian grounds, rather than for reasons of international

94. Feneberg, *supra* note 16, at 17.

95. *See* MATTHEW SCOTT, CLIMATE CHANGE, DISASTERS AND THE REFUGEE CONVENTION 45 (2020).

96. *See, e.g.*, MARGIT AMMER, MONIKA MAYRHOFER, & MATTHEW SCOTT, DISASTER-RELATED DISPLACEMENT INTO EUROPE: JUDICIAL PRACTICE IN AUSTRIA AND SWEDEN (2022); Matthew Scott & Russell Garner, *Nordic Norms, Natural Disasters, and International Protection: Swedish and Finnish Practice in European Perspective*, 91 NORDIC J. INT'L L. 101 (2021); Chiara Scissa, Francesca Bondi Dal Monte, Matthew Scott, Margit Ammer, & Monika Mayrhofer, *Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden*, VÖLKERRECHTSBLOG (Oct. 19, 2022), https://voelkerrechtsblog.org/legal-and-judicial-responses-to-disaster-displacement-in-italy-austria-and-sweden; Jane McAdam, *The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement*, 3 MIGRATION STUD. 131 (2015). Other cases where environmental impacts were a relevant contextual factor include: CAA Bordeaux, 2e ch., Dec. 18. 2020, 20BX02193, 20BX02195 (Fr.) (removal to Bangladesh precluded on humanitarian—rather than international protection—grounds for a man suffering severe respiratory illness because of poor air quality and lack of sufficient health care); *AC (Taiwan)* [2017] NZIPT 503484 (N.Z.) (removal to Taiwan precluded on humanitarian—rather than international protection—grounds given transboundary air pollution originating from mainland China, and the applicant's particular medical condition); note also other humanitarian cases discussed in *MS (India)* [2022] NZIPT 802082 at [40-41] (N.Z.) [hereinafter *MS (India)*]; *cf. 1510755 (Refugee)* [2019] AATA 3420 (Austl.); Verwaltungsgerichtshof [VGH] [Higher Administrative Court], Dec. 17, 2020, A 11 S 2042/20 (Ger.) (removal to Afghanistan precluded because of deteriorating humanitarian conditions there, based on a multitude of factors, including environmental conditions linked to climate and disasters, and the fact that his lack of family connections there would impact on his ability to survive, amounted to inhuman or degrading treatment).

protection[97]—these factors were considered as part of the overall context for the claim, alongside the individual's particular circumstances (often health-related), instead of being analyzed as the basis for protection in and of itself. Environmental factors tended to be framed as economic issues;[98] in the Austrian cases, they went to the "real risk" assessment and/or the availability of an internal flight alternative.[99]

In the few cases where protection was forthcoming, it was on the basis of an *existing* disaster or *existing* environmental conditions, rather than ones that might materialize in the future. For instance, in the 2017 case of *W251 2137996-1*,[100] the Austrian *Bundesverwaltungsgericht* (Federal Administrative Court) granted subsidiary protection because the applicant's life and physical integrity were at risk on account of an intensifying drought and precarious food supply, especially because he and his family relied on subsistence farming in the worst drought-affected areas. The applicant had no education or other livelihood and thus would have no alternative means of earning a living. This finding was particularly interesting given that the main ground of his protection claim (which was unsuccessful) was that he feared persecution by Al-Shabaab because of his mother's clan membership.

By contrast, reasoning in some of the Swedish cases revealed an unsophisticated temporal understanding of disaster impacts, reflecting the

97. The Swedish Aliens Act previously extended international protection to a person who was unable to return to their home country because of an "environmental disaster," but it appears that no one ever benefited from this provision: 4 ch. 2 a (3) § UTLÄNNINGSLAGEN [Aliens Act] (Svensk författningssamling [SFS] 2005:716) (Swed.). In addition to "structural factors," Scott & Garner suggest that it was ineffective due to its overly "general wording," "coupled with the very narrow eligibility criteria articulated in the preparatory works, which together established a category of international protection that was no more generous than existing refugee and complementary protection provisions, and may even be understood as being more restrictive." *See* Scott & Garner, *supra* note 96, at 115.

98. AMMER ET AL., *supra* note 96, at 8. *See also 1701903 (Refugee)* [2020] AATA 297 (Austl.) ("the applicant's economic hardship has been caused by the destruction inflicted by Cyclone Winston and is not the consequence of an intentional act directed specifically at the applicant"). Although note the requirement in Australian law, for instance, that an act is "intentional." *See Migration Act 1958* (Cth), s 5(1) (Austl.).

Indeed, in one case, where an applicant raised (in part) the aftereffects of the earthquake in Nepal, the Administrative Appeals Tribunal even stated "there will be opportunities arising from the earthquake given funds being provided to rebuild Nepal. As a relatively young and healthy man who has worked as a [occupation] in Australia, the Tribunal very much hopes he will be in a position to take advantage of the opportunities that will arise in terms of rebuilding from this devastating event." *See 1412258 (Refugee)* [2015] AATA 3167, ¶ 64.

99. AMMER ET AL., *supra* note 96, at 13.

100. Bundesverwaltungsgericht [BVwG] [Federal Administrative Court] June 7, 2017, W251 2137996-1 (Austria). *See also* AMMER ET AL., *supra* note 96, at 14.

idea that a disaster is a single event and once it is over, so, too, are its effects.[101] This understanding fails to recognize that disasters may have ongoing socio-economic impacts, especially for particular groups. As Matthew Scott notes,

> Particularly for individuals living already marginal existences, a return to "pre-disaster levels" entails a return to a situation of exposure and vulnerability, albeit potentially significantly more marginal than before the unfolding of the "natural" disaster. Assessment of risk on return in the context of RSD should therefore not stop with consideration of the disaster relief cycle, but needs instead to examine foreseeable exposure to disaster-related harm in the context of a subsequent disaster.[102]

This perspective embodies the so-called "predicament approach, with its broad temporal lens (in contrast to a narrow, event-based approach, where violence equates solely with a concrete event or isolated act)."[103] As the New Zealand IPT has stated in the context of gender-based claims (such as domestic violence), "the relevant timeframe in which to assess the condition of being persecuted *must be broad enough to encompass a continuum of repeated harms of varying nature and intensity*."[104] There, a "salient characteristic" of harm is an "accumulation of instances of harm . . . along a continuum of time,"[105] such that there is "a fusion of past, present and future, where harm breeds harm and metastasizes into new and distinct landscapes."[106] Scott suggests,

> Instead of seeking precise predictions, the risk assessment in relation to a foreseeable future disaster may more appropriately focus on the overall likelihood that a hazard will unfold in the foreseeable future. Instead of looking [only] to the [hypothetical] future, this approach looks for patterns over time in

101. See discussion of *UM2032-11* and *UM15983-10* in AMMER ET AL., *supra* note 96, at 25-26.

102. SCOTT, *supra* note 95, at 139. Whether or not a person obtains protection in the aftermath of a disaster may depend on how quickly their claim is heard.

103. *OF (India)* [2023] NZIPT 802113 at [82] (N.Z.) [hereinafter *OF (India)*].

104. *Id.* at [120] (emphasis added).

105. *Id.* at [122].

106. *Id.* at [126]. *See also* BURSON, *supra* note 82, at 5 ("the temporal distribution of any episodes of past persecution may affect the calculus as to the content of future time. The force exerted by time on the assessment will, however, also vary according to the nature of the claim and, in particular, will differ between more individualised claims and claims of a more generalised nature.").

> order to deduce the relative likelihood of a hazard event or process unfolding within a foreseeable timeframe.[107]

It is therefore essential to understand how the impacts of disasters and climate change intersect with other social, economic, cultural, and political factors driving movement. As the U.N. High Commissioner for Refugees (UNHCR) has emphasized,

> The adverse effects of climate change and disasters are often exacerbated by other factors such as poor governance, undermining public order; scarce natural resources, fragile ecosystems, demographic changes, socio-economic inequality, xenophobia, and political and religious tensions, in some cases leading to violence. As a result of these negative impacts of climate change and disasters, combined with social vulnerabilities, people may be compelled to leave their country and seek international protection.[108]

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107. SCOTT, *supra* note 95, at 139-40. Since 2018, Italy's Consolidated Act on Immigration has provided decision-makers with a residual discretion to grant a temporary residence permit where a person faces a "contingent and exceptional calamity." Decreto legge 4 ottobre 2018, n. 113, come convertito, con modificazioni, dalla legge 1 dicembre 2018, n. 132, G.U. Mar. 12, 2018, n. 281 (It.). The text was amended in 2020 to a "serious calamity," Decreto legge 21 ottobre 2020, n. 130, come convertito, con modificazioni, dalla legge 18 dicembre 2020, n. 173 G.U. Dec. 19, 2020, n. 314 (It.), and offered the prospect of permanent residence for work purposes, but the original text was reinstated in 2023, Decreto legge 10 marzo 2023 n. 20, come convertito, con modificazioni, dalla legge 5 maggio 2023, n. 50, G.U. May 5, 2023, n.104. According to Scissa, whereas the 2020 amendment "seem[ed] to allow for a broader interpretation of 'calamity' based on the degree of severity rather than on its progression over time," the original/current version suggests harm must be immediate, "mean[ing] that only sudden and singular events, such as earthquakes or floods, could be considered as eligible events under this provision and that slow-onset events were excluded." Chiara Scissa, *The Climate Changes, Should EU Migration Law Change as Well? Insights from Italy*, 14 EUR. J. LEGAL STUD. 5, 18 (2022) [hereinafter Scissa, 2022] (referring also to the Cass., sec. II, 8 aprile 2021, n. 9366, 3). For a detailed overview of amendments to Italian legislation in this area, see *id.* at 18-20. *See also* Fabrizio Vona, *Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy? Some Remarks on the Ordinance No. 5022/2021 of the Italian Corte Suprema di Cassazione*, 1 ITALIAN REV. INT'L & COMPAR. L. 146, 149-50 n. 6 (2021). *See generally* Francesco Negozio, *What Legal Options for Environmental and Climate-Displaced People Under the Italian Protection System? Complementary Protection on Humanitarian Grounds v. Ad Hoc Regimes*, REFUGEE LAW INITIATIVE (Sept. 30, 2022) https://rli.blogs.sas.ac.uk/2022/09/30/what-legal-options-for-environmental-and-climate-displaced-people-under-the-italian-protection-system/. For a breakdown of successful applicants and the countries they came from, see Chiara Scissa, *An Innovative Analysis of Italy's Protection Against Disaster Displacement: Numbers and Profiles of the Beneficiaries*, REFUGEE LAW INITIATIVE (May 5, 2023) https://rli.blogs.sas.ac.uk/2023/05/05/an-innovative-analysis-of-italys-protection-against-disaster-displacement-numbers-and-profiles-of-the-beneficiaries/ [hereinafter Scissa, 2023].

108. UNHCR Legal Considerations, *supra* note 89, at ¶ 2.

For instance, in 2021, the Italian Supreme Court of Cassation held that disasters may "affect the vulnerability of the applicant if accompanied by adequate allegations and evidence relating to the possible violation of primary human rights, which may expose the applicant to the risk of living conditions that do not respect the core of fundamental rights that complement dignity."[109] In other words, disasters can exacerbate existing vulnerabilities and expose people to risks of human rights violations.[110]

The New Zealand IPT has highlighted the differential impacts of disasters and climate change on particular individuals and groups even more explicitly, including on account of age, gender, health, and disability.[111] In *AC (Eritrea)*, it found that an elderly couple from Eritrea would face "conditions of abject poverty, underdevelopment and likely displacement" if returned to their country.[112] This was "further heightened by climate change," which "disproportionately affect[s] the most vulnerable persons and systems."[113] As older persons, they faced a "heightened risk of dying from climate-related disasters."[114] Together with a range of other factors, including poor governance, corruption, and human rights abuses, New Zealand's IPT found that there was "a real chance that their rights to be free from cruel, inhuman or degrading treatment in Article 7 of the ICCPR will be impinged[,] giving rise to serious harm within the meaning of being persecuted."[115]

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109. *See generally* Cass., sez. II, 4 febbraio 2020, n. 2563, (cited in and translated by Scissa, 2022, *supra* note 107, at 21).

110. *See generally* Cass., sez. un., 8 gennaio 2021, n. 121; Cass., sez. lav., 19 maggio 2021, n. 13652, (cited in Scissa, 2022, *supra* note 107, at 21 n. 52).

111. *See* SCOTT, *supra* note 95, at 141 (arguing that "[w]hen individual risk factors, including vulnerability arising from past exposure to "natural" disasters combined with marginal social position owing to discrimination, and other factors are considered against an overall risk outlook, it becomes possible to at least begin to consider incorporating the risk of being exposed to disaster-related harm in a future disaster into the determination of claims for refugee status.").

112. *AC (Eritrea)* [2023] NZIPT 802201 at [142] (N.Z.) [hereinafter *AC (Eritrea)*].

113. *Id.* at [144]. *See also* Comm. on the Rts. of the Child, D.R. v. Switzerland, Communication No. 86/2019, ¶ 11.3, U.N. Doc. CRC/C/87/D/86/2019 (May 31, 2021).

114. *AC (Eritrea)*, *supra* note 112, at [145]. "Country sources establish that climate change is contributing, through droughts and heavy rainfall events, to severe food security challenges in Eritrea. It is broadly acknowledged that extreme weather events and disasters brought about by climate change have impacted the Horn of Africa and are increasing in frequency and intensity. Such phenomena disproportionately affect the most vulnerable persons and systems." *Id.* at [144].

115. *Id.* at [147].

2. Imminence as Timing of Harm: Future Risk

As noted above, the most detailed and systematic jurisprudential analysis of climate-related protection claims comes from the New Zealand IPT.[116] The IPT has stated that it is "unquestionably the case" that "exposure to a hazard . . . can, in principle, form the basis for a refugee and protected person status claim" and that "no special rules apply . . . [such cases] must meet the same threshold requirements as any other case."[117]

In refugee law, the question of whether someone has a well-founded fear of being persecuted is, by its nature, a forward-looking test. The requirement is that the risk of harm be real, credible, and not farfetched or speculative.[118] There are two elements: that the harm itself satisfies the requisite threshold, and that the standard of proof is satisfied. The risk of harm must not be too remote—not necessarily in a temporal sense, but in terms of its likelihood. The temporal issue may, however, be relevant in determining how realistic it is that the harm could be mitigated (such that it does not reach the requisite threshold) or averted by mitigation or adaptation measures. Protection is not contingent on identifying which state(s) is/are responsible for the actual harm, but rather whether the individual concerned has a well-founded fear of being persecuted (for a reason set out in the Convention Relating to the Status of Refugees) or otherwise faces a real risk of being subjected to other types of serious harm, such as torture; cruel, inhuman, or degrading treatment or punishment; or arbitrary deprivation of life.[119]

In a series of cases concerning applicants from Pacific Island states, the IPT has examined whether risks of harm manifesting in the future, including as a result of sea-level rise, justify the granting of international protection at the present time. In the matter of *AF (Kiribati)*, the applicant and his family did "not wish to return to Kiribati because of the difficulties they faced due to the combined pressures of over-population and sea-level-rise."[120] The IPT accepted that while there was a potential

116. *See also* UNHCR Legal Considerations, *supra* note 89; Hum. Rts. Comm., Teitiota v. New Zealand, Communication No. 2728/2016, ¶ 9.11, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019).

117. *MS (India)*, *supra* note 96, ¶ 49.

118. *See* GOODWIN-GILL & MCADAM, *supra* note 4, at 57. This test could prove instructive in the context of other climate litigation which seeks to establish remedies, liability and/or preventive measures to avert the future impacts of climate change.

119. *See id.* at 636-68.

120. *AF (Kiribati)*, *supra* note 79, at [41].

risk to the applicant's life from "sea-level rise and other natural disasters,"[121] it fell "well short of the threshold required to establish substantial grounds for believing that they would be in danger of arbitrary deprivation of life within the scope of Article 6 [of the ICCPR]," remaining "firmly in the realm of conjecture or surmise."[122] Furthermore, the applicant could not "establish that there [was] a sufficient degree of risk to his life, or that of his family, *at the present time*."[123] In making this statement, the IPT noted the U.N. Human Rights Committee's admissibility requirement that a risk of harm be "imminent."[124] However, the IPT made clear that "imminence" did not require a temporally immediate risk of harm:

> Imminence should not be understood as imposing a test which requires the risk to life be something which is, at least, likely to occur. Rather, the concept of an "imminent" risk to life is to be interpreted in light of the express wording of section 131 [of the Immigration Act 2009]. This requires *no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger*. In other words, these standards should be seen as *largely synonymous requiring something akin to the refugee "real chance" standard*. That is to say, something which is more than above mere speculation and conjecture, but sitting below the civil balance of probability standard.[125]

Imminence is thus equated with foreseeability, which is, in our view, the appropriate analytical frame. There is nothing inherent in either the "well-founded fear" test in refugee law or the "real risk" test in international human rights law that requires harm to be imminent in order to engage a state's protection obligations[126]—and to impose such a requirement would be wrong, as a matter of law.[127]

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121. *Id.* at [91].

122. *Id.*; *see* BURSON, *supra* note 82, at 3 ("There must be a sufficiently solid and objective evidential foundation to enable informed assessments to be made about what future time means for the claimant if returned to their country of origin.").

123. *AF (Kiribati), supra* note 79, at [89] (emphasis added).

124. *Id.* (citing Hum. Rts. Comm., Aalbersberg v. Netherlands, Communication No. 1440/2005, U.N. Doc. CCPR/C/87/D/1440/2005 (Aug. 14, 2006)).

125. *AF (Kiribati), supra* note 79, at [90] (emphasis added). As the decision-maker stated extracurially, "I believe it is a mistake to import even the language of imminence into RSD. Whatever its merits for other branches of international law, it is fundamentally ill-suited to the task of RSD." BURSON, *supra* note 82, at 7. *See also* VGH, Dec. 17, 2020, A 11 S 2042/20, ¶ 32 (Ger.).

126. Anderson et al., 2019, *supra* note 5, at 122 ("there is no conceptual reason why imminence—in the sense of timing—should be used to limit a State's protection obligations.").

127. *See also* Scott & Garner, *supra* note 96, at 118 (arguing that any attempt to create "new" protection categories in the climate/disaster context "cannot avoid being redundant, and thereby risks

The U.N. Human Rights Committee's consideration of this same case reflects the nuance of this approach,[128] but not clearly. Indeed, the imprecision of the Committee's wording has unfortunately generated considerable confusion, leading many commentators to tacitly assume,[129] or expressly believe,[130] that imminence forms part of the test for a substantive violation. As we have observed elsewhere,[131]

> Any misapprehension by lawyers, advocates and decision-makers that imminence of harm is a prerequisite to establishing a violation is likely to seriously diminish the appetite for strategic litigation on this important issue, and thus hinder the development of

engendering conceptual confusion." "What is the harm threshold if not 'persecution' or 'serious harm'? What is the standard of proof and temporal scope if not a 'well-founded fear' 'or substantial grounds for believing there is a real risk'? In short, how would any new provision be interpreted, if not with reference to existing international protection standards? A better approach would be to encourage consideration of environmental factors through guidance for decision-makers, and through progressive interpretation of existing international law.").

128. Hum. Rts. Comm., Teitiota v. New Zealand, Communication No. 2728/2016, ¶ 8.4, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) (referring *inter alia* to *Aalbersberg*, ¶ 6.3, U.N. Doc. CCPR/C/87/D/1440/2005; Hum. Rts. Comm., Bordes v. France, Communication No. 645/1995, ¶ 5.5, U.N. Doc. CCPR/C/57/D/645/1995 (July 30, 1996)).

129. Simon Behrman & Avidan Kent, *The Teitiota Case and the Limitations of the Human Rights Framework*, 75 QUESTIONS OF INT'L L. 25, 36 (2020); Chhaya Bhardwaj, *Ioane Teitiota v New Zealand (Advance Unedited Version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020*, 23 ENV'T L. REV. 263 (2021); Ivanka Bergova, *Environmental Migration and Asylum: Ioane Teitiota v. New Zealand*, 42 JUST. SYS. J. 222 (2021).

130. Adaena Sinclair-Blakemore, *Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees Under International Human Rights Law?*, OXHRH BLOG (Jan. 28, 2020), https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law; Urshila Pandit, *An Analysis of Ioane Teitiota v New Zealand: Paving the Way for Climate Refugees and Non Refoulement Obligations of States Under Article 6 of the ICCPR*, NUALS L.J. BLOG (May 1, 2020) https://nualslawjournal.com/2020/05/01/an-analysis-of-ioane-teitiota-v-new-zealand-paving-the-way-for-climate-refugees-and-non-refoulement-obligations-of-states-under-article-6-of-the-iccpr/; *UN Human Rights Committee Decision on Climate Change is a Wake-Up Call, According to UNHCR*, UNHCR (Jan. 24, 2020) https://www.unhcr.org/en-au/news/briefing/2020/1/5e2ab8ae4/un-human-rights-committee-decision-climate-change-wake-up-call-according.html; Ayako Hatano, *Emerging International Norms to Protect "Climate Refugees"?: Human Rights Committee's Decision on* Teitiota v New Zealand, 10 J. OF HUM. SEC. STUD. 32, 43 (2021); Simon A. Behrman & Avidan Kent, *Prospects for Protection in Light of the Human Rights Committee's Decision in Teitiota v New Zealand*, 6 POLISH MIGRATION REV. 24 (2020); CHANDNI SINHA DAS, LUCÍA ESPINAL SOLÓRZANO, NATAN LAST, SHAINDL KESHEN, STEVEN LAZICKAS, VICTORIA BROWNING, & YURI KAWASE, ENVIRONMENTAL MIGRANTS: CHALLENGES AND OPPORTUNITIES FOR THE PROTECTION OF THEIR RIGHTS: LEGAL FRAMEWORK MANUAL AND ACTIVITY PACKET 6, 29-30, 37, 39, 41 (2021).

131. *See* Foster & McAdam, 2022, *supra* note 8 at 978.

> jurisprudence. It may also result in confusion about the applicable test in protection law more generally.[132]

The confusion seems to have emerged from the Committee's conflation of issues relevant to admissibility and merits[133] and its reference to a timeframe (ten to fifteen years)[134] in determining whether or not there was a "real risk of harm."[135] Notwithstanding our critique of that timeframe below, the Committee emphasized that conditions "may become incompatible with the right to life with dignity before the risk is realized," meaning that people do not have to wait until the situation is imminently life-threatening before a protection need will arise.[136] This suggests that harm of a sufficient degree may materialize before the Committee's (arbitrary) ten-to-fifteen-year timeframe. For instance, the Italian Supreme Court of Cassation observed that the right to life may be at risk when "conditions of social, environmental or climatic degradation, or contexts of unsustainable exploitation of natural resources . . . entail a serious risk for the survival of the individual,"[137] emphasizing the role of human acts or omissions in creating that situation.[138] However, the more

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132. *Id.* See, for example, the contradictory approach by the International Law Commission (ILC), seemingly stemming from misunderstanding that complementary protection is the domestic analogue of the international human rights law jurisprudence on *non-refoulement*. At paragraph 208, for instance, the ILC (correctly) notes that the threshold requirement is a "real and foreseeable risk," but then at paragraph 251 it (erroneously) states that for protection to be forthcoming, "the risk to life must be actual or imminent." *See* ILC, *Sea-Level Rise in Relation to International Law: Additional Paper to the Second Issues Paper (2022) by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law*, U.N. Doc. A/CN.4/774 (Feb. 19, 2024), ¶ 151 (emphasis added) [hereinafter ILC, 2024].

133. *Teitiota*, ¶¶ 6.1, 6.2, 8.5, 9.6, U.N. Doc. CCPR/C/127/D/2728/2016.

134. *See id.* ¶¶ 7.2, 9.10, 9.11.

135. *See, e.g.*, Sinclair-Blakemore, *supra* note 130.

136. *Teitiota*, ¶ 9.4, U.N. Doc. CCPR/C/127/D/2728/2016.

137. Cass., sez. II, 24 febbraio 2021, n. 5022, at ¶ 5 (It.), cited in (and translated by) Scissa, 2023, *supra* note 107, at 22.

138. Chiara Scissa, Sant'Anna School of Advanced Studies, *Submission to The Impact of Climate Change and the Protection of the Human Rights of Migrants: Report of the Special Rapporteur on the Human Rights of Migrants*, OHCHR (May 2022), https://www.ohchr.org/sites/default/files/2022-05/sant-anna-school-of-advanced-studies.docx. In Trib. Firenze, 14 settembre 2022, order n. 17893/2019, 13, which directly cites *Teitiota*, U.N. Doc. CCPR/C/127/D/2728/2016, the tribunal contrasted the applicant's integration into Italy and his future prospects there with "the situation of serious uncertainty about his future life that would await him in his country of origin," including the existence of a "current national emergency" in Pakistan where "33 million people are currently affected by flash floods." We thank Chiara Scissa for drawing our attention to this case.

"imminent" that the harm appears to be, the more "real" a decision-maker may consider its risk of materializing.[139]

That is the crux of why the timing of harm may indeed be such an important factor. In *AC (Tuvalu)*, the New Zealand IPT observed that the "forward looking assessment of risk means that the slow-onset nature of some of the impacts of climate change such as sea-level-rise will need to be factored into the inquiry as to whether such 'danger' exists at the time the determination has to be made."[140] When determining whether such harm could reach the requisite threshold to substantiate a *non-refoulement* claim, the IPT explained that the assessment was "necessarily context-dependent," for "much will depend on the nature of the process in question, the extent to which the negative impacts of that process are already manifesting, and the anticipated consequences for the individual claimant."[141]

In *AW (Kiribati)*, the IPT sought to clarify this messy state of affairs. In a section entitled "The question of time,"[142] the decision-maker, Bruce Burson, lamented that a consequence of his earlier decision in *AF (Kiribati)*—exacerbated by the U.N. Human Rights Committee's views in *Teitiota v. New Zealand*—was the "excite[ment of] much interest in the concept of imminence as the appropriate yardstick of time within which qualifying harm must arise."[143] Noting our own analysis of "the problems with this unwelcome development,"[144] he clarified that "[w]hile an imminent risk of persecutory harm will certainly meet the real chance standard, this is not to say that it is *only* imminent risk which

139. *Teitiota*, ¶¶ 9.3, 9.6, 9.7, U.N. Doc. CCPR/C/127/D/2728/2016. *See also Urgenda*, Dec. 20, 2019, *supra* note 90, ¶ 5.2.2, where immediacy was linked to the harm "directly threatening the persons involved," including over the longer term. Feneberg's fascinating study of German jurisprudence concerning assisted returns of asylum seekers found that the courts "reframe the question of *time* . . . as a matter of *responsibility*," meaning that "a state's responsibility only extends to a short period after deportation and that therefore any human rights violation must occur shortly upon return." Feneberg, *supra* note 16, referring to Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Mar. 21, 1996, 9 C 9/95, ¶ 14 which references exposure to "certain death or the most serious injuries." However, "[t]he longer the period of livelihood security covered by return assistance, the higher the probability of impoverishment after this period must be." BVerwG, Apr. 21, 2022, 1 C 10/21, ¶ 25, https://www.bverwg.de/210422U1C10.21.0 (emphasis added). Translations are based on those of Feneberg and the authors.

140. *AC (Tuvalu)*, *supra* note 88.

141. *Id.* at [58].

142. *AW (Kiribati)*, *supra* note 14, at [101-15].

143. *Id.* at [102].

144. *Id.*

does so."[145] The relevant standard is a "real chance" of harm[146]—the same as in any other refugee or complementary protection claim.

While the legal test is clear, an assessment of "the relationship between risk and time" is less straightforward.[147] Acknowledging the "reasonably foreseeable future" standard in some jurisdictions,[148] the IPT accepted that "not only the immediate future may be relevant"[149] and that this standard "curb[s] any short-sightedness in the inquiry."[150] However, the IPT argued that, from a practical perspective,

> the relevant time is entirely contextual; a function of the relationship between the appellant's individual characteristic or attributes and the asserted drivers of risk which lie behind the claim. The force exerted by time on the assessment of whether the threshold of risk is reached will thus vary according to the nature of the claim.[151]

Reiterating reasoning from earlier cases, the IPT explained that in cases concerning climate change-related hazards,

> time may weigh more heavily in terms of when the requisite degree/threshold of risk is reached. This is because the further in time the decision-maker projects, the greater the opportunity for risk-reducing factors to intrude. There is a corresponding need to account for any measures which may reduce otherwise generally "foreseeable" risks of harm over time.[152]

Such "risk-reducing factors" include "climate change adaptation or disaster risk reduction projects and programming, as well as those undertaken to promote sustainable development."[153] They must be

145. *Id.* at [103] (pointing in particular to *AF (Kiribati)*, *supra* note 79, at [90]).

146. *AW (Kiribati)*, *supra* note 14, at [103].

147. *Id.* at [104].

148. *Id.* (citing Anderson et al., 2020, *supra* note 8). *See also OF (India)*, *supra* note 103, at [137] (citing Karanakaran v. Sec'y of State for the Home Dep't [2000] 3 All ER 449 (U.K.)); *Minister for Immigr & Ethnic Affs v Wu Shan Liang* (1996) 185 CLR 259, 278 (Austl.); *NAHI v Minister for Immigr & Multicultural & Indigenous Affs* [2004] FCAFC 10, ¶ 13 (Austl.).

149. *AW (Kiribati)*, *supra* note 14, at [105].

150. *OF (India)*, *supra* note 103, at [139].

151. *AW (Kiribati)*, *supra* note 14, at [105]. The IPT in *OF (India)*, *supra* note 103, at [141], described this approach as "plainly correct."

152. *AW (Kiribati)*, *supra* note 14, at [106].

153. *Id.* at [108].

assessed according to the "trajectory of risk faced by the claimant given his/her characteristics."[154]

While conditions in the Pacific may mean that risks to life and well-being are "reasonably foreseeable" over an extended timeframe, the IPT has suggested that "this degree of foreseeability is, in context, a poor measure of risk sufficient to warrant engagement of hard-edged international protection obligations grounded in the *non-refoulement* principle."[155] It is not clear to us why this is so. If there is a foreseeable risk to life and well-being that amounts to a threat to the right to life with dignity[156] or the right not to be subjected to inhuman or degrading treatment, then an international protection claim is surely made out. There is always a weighing up of the evidence, harm, and risk;[157] the fact that "the temporal limits embodied in this notion [of the reasonably foreseeable future] itself remain unclear"[158] should not undermine its utility as a tool in an area in which speculation about the future is inherent.

3. Timeframes and Mitigation of the Risk of Harm

Decision-makers' reluctance to consider a longer timeframe appears to turn on the issue of "risk-reducing factors";[159] in other words, a longer timeframe gives the state more opportunities to prevent harm. At the outset, it is important to note the arbitrariness of the ten-to-fifteen-year timeframe employed by the U.N. Human Rights Committee. It stated,

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154. *Id.* referring also to *AC (Tuvalu)*, *supra* note 88, at [69]: "given the forward looking nature of the inquiry, the nature of the hazard, including its intensity and frequency, as well as any positive changes in disaster risk reduction and operational responses in the country of origin, or improvements in its adaptive capacity, will need to be accounted for." *See also* Hum. Rts. Comm., Teitiota v. New Zealand, Communication No. 2728/2016, ¶ 9.12, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019); Hum. Rts. Comm., Billy v. Australia, Communication No. 3624/2019, ¶ 8.7, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 18, 2023).

155. *AW (Kiribati)*, *supra* note 14, at [107].

156. "The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity." Hum. Rts. Comm., General Comment No. 36: Article 6: Right to Life, ¶ 3, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

157. As the IPT notes, "refugee status decision makers should always be vigilant and on notice to flexibly appraise all relevant evidence and risk vectors in the inquiry, without the need to impose a supra-additional standard." *OF (India)*, *supra* note 103, at [139] (referring also to the discussion in *AW (Kiribati)*, *supra* note 14, at [97-115].)

158. *OF (India)*, *supra* note 103, at [139].

159. *AW (Kiribati)*, *supra* note 14, at [106].

> In the present case, the Committee accepts the author's claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. Based on the information made available to it, the Committee is not in a position to conclude that the assessment of the domestic authorities that the measures taken by the Republic of Kiribati would suffice to protect the author's right to life under article 6 of the Covenant was clearly arbitrary or erroneous in this regard, or amounted to a denial of justice.[160]

In any international protection case, the risk assessment requires consideration of the well-foundedness of the harm in light of the likelihood that the country of origin can (and will) provide protection against such harm.[161] If the country of origin is able and willing to provide protection at an effective level, then there may be no real risk of harm. The reference above to "intervening acts by the Republic of Kiribati" appears to be directed at this question.[162] However, it is an incredible proposition that a state might be obliged to "relocate its population" in order to fulfill its positive duties to protect human rights. This would surely constitute an "impossible or disproportionate burden" on the country of origin and could not be considered "reasonable."[163] As the IPT observed in the later case of *AW (Kiribati)*,

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160. Hum. Rts. Comm., Teitiota v. New Zealand, Communication No. 2728/2016, ¶ 9.12 U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019). Contrast the dissenting view of Duncan Muhumuza Laki, who argued that the majority placed "an unreasonable burden of proof" on the complainant, and that Mr. Teitiota faced "a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of the conditions in Kiribati." *Id.* Annex II, ¶¶ 1, 5 respectively.

161. Refugee Convention, *supra* note 7, art. 1A(2).

162. *Teitiota*, ¶ 9.12, U.N. Doc. CCPR/C/127/D/2728/2016.

163. Osman v. United Kingdom, App. No. 23452/94, 29 Eur. Ct. H.R. 245, 305 (1998); *accord* Budayeva v. Russia, 59 Eur. Ct. H.R. 59, 85 (2008) ("In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources."). This results from the wide margin of appreciation States enjoy in difficult social and technical spheres. *See* Hatton v. United Kingdom, App. No. 36022/97, ¶¶ 100-101 (July 8, 2023), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61188%22]}. *See also* Öneryildiz v.

> The assertion that as-yet-unrealised and inherently complex planned relocation can be factored into existing risk assessments in relation to Kiribati is questionable given projected population increases, limited land availability, land tenure arrangements and anticipated degradation of available land over time.[164]

Also, while relocation might safeguard certain human rights, it could jeopardize others, including rights to culture and even self-determination.[165] Cross-border relocations are particularly complex and would require the consent of other countries.[166]

Furthermore, the IPT questioned the robustness of the timeframe, noting that it was "merely asserted by the author of the complaint" rather than "grounded in scientific evidence and/or customary or indigenous knowledge," and that assertion "sits uneasily against the assessment of the IPCC [(Intergovernmental Panel on Climate Change)] . . . which makes no such claim and points to a potentially far longer timeframe for habitability thresholds to be reached."[167] In any event, the U.N. Human Rights Committee regarded a decade-plus timeframe as giving Kiribati the opportunity "to take affirmative measures to protect" its population.[168]

While stating the important principle that the key question is "a state's failure to protect under Article 6 of the ICCPR (or other human rights breaches) [that] may reach the requisite real chance (risk) threshold,"[169] multiple cases have placed the primary focus on the state's *willingness*, rather than its *ability*, to protect its population. For instance, the IPT has found that the country of origin is already taking adequate steps to address the impacts of climate change,[170] and that "this can be expected to continue into the future."[171] The IPT has acknowledged some

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Turkey (No. 2), 41 Eur. Ct. H.R. 325, 364 (2004); *cf. Budayeva*, 59 Eur. H.R. Rep. at 86 ("This consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.").

164. *AW (Kiribati)*, *supra* note 14, at [112]. *See also* Burson et al., *supra* note 47, at 398-401.

165. *See, e.g.*, JANE MCADAM & TAMARA WOOD, KALDOR CENTRE PRINCIPLES ON CLIMATE MOBILITY, princ. 5 (Nov. 2023), https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/kaldor-centre/2023-11-others/2023-11-Principles-on-Climate-Mobility_v-4_DIGITAL_Singles.pdf.

166. *See, e.g.*, Jane McAdam, *Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change*, 49 J. PAC. HIST. 301 (2014).

167. *AW (Kiribati)*, *supra* note 14, at [109] (citations omitted).

168. *Teitiota*, ¶ 9.12, U.N. Doc. CCPR/C/127/D/2728/2016.

169. *AW (Kiribati)*, *supra* note 14, at [115].

170. *AF (Kiribati)*, *supra* note 79, at [88]; *AW (Kiribati)*, *supra* note 14, at [121].

171. *AW (Kiribati)*, *supra* note 14, at [120].

"implementation problems"[172] but has not assessed the (past or future) *effectiveness* of relevant programs and policies:

> While giving full weight to the expected upward trajectory of adverse climate change impacts on Kiribati in the coming years, there is no sufficiently compelling evidence before the Tribunal to establish that existing and future climate change adaptation and disaster risk reduction measures by the successive governments in Kiribati, acting in cooperation with the international community, international organisations and civil society and alongside ongoing sustainable development projects and programming, will not reduce the risk that the appellant's international human rights will be breached (whether including a right to life with dignity or not), to below the real chance standard.[173]

This is an approach that has run through the IPT's decisions concerning protection from disasters and the impacts of climate change, and reflects jurisprudence from the ECtHR concerning state responsibility for disasters.[174] In *AC (Tuvalu)*,[175] the IPT explained that disasters "derive from vulnerability to natural hazards such as droughts and hurricanes, and inundation due to sea-level rise and storm surges."[176] As such, Tuvalu's "positive obligations to take steps to protect the life of persons within its jurisdiction from such hazards must necessarily be shaped by this reality":

> While the Government of Tuvalu certainly has both obligations and capacity to take steps to reduce the risks from known environmental hazards, for example by undertaking ex-ante disaster risk reduction measures or though ex-post operational responses, it is simply not within the power of the Government of Tuvalu to mitigate the underlying environmental drivers of these hazards. To equate such inability with a failure of state protection goes too far. It places an impossible burden on a state.[177]

172. *Id.*

173. *Id.* at [128].

174. *See e.g.,* Budayeva v. Russia, 59 Eur. Ct. H.R. 59, 59 (2008). *See also* Öneryildiz v. Turkey (No. 2), 41 Eur. Ct. H.R. at 325 (2004).

175. *AC (Tuvalu)*, *supra* note 88, at [74].

176. *Id.* at [75].

177. *Id. See also* Stoyanova, *supra* note 53, at 607-09.

There are four key observations to be made here. First, read together, these cases suggest that it is only where the home state has *failed* in its obligations to respect and protect human life and/or other ICCPR rights that an individual is entitled to international protection. This is most clearly articulated in *AC (Tuvalu)* with the reference to the "burden on a state,"[178] but it is implicit in other analyses as well. We argue that this focus is misdirected; *AC (Tuvalu)*, *AF (Kiribati)*, *AW (Kiribati)*, and *Teitiota* were *not* cases about the obligations of the home state, but rather about the *non-refoulement* obligations of receiving states. The home state's actions were relevant only insofar as they might reduce the risk of harm to below the "real risk" standard. In this regard, these cases are distinct from matters such as *Billy*, *Budayeva*, and *Verein Klimaseniorinnen Schweiz*,[179] which *were* about the responsibility and accountability of the home state. In such cases, it may well be appropriate to adopt a test akin to a "due diligence" standard. However, in international protection cases, where the underlying question is the need for protection, not state responsibility, a "due diligence" test is incorrect.[180] This misconception persists, as recently illustrated by the International Law Commission's conflation of the distinct legal issues pertinent to state responsibility, on the one hand, and international protection, on the other.[181]

Secondly, the analysis in *AW (Kiribati)* introduces a questionable dimension to assessing the availability of protection, namely, the notion that protection is not confined to what the state may offer but extends to "successive governments" acting in cooperation with "the international community, international organisations and civil society."[182] This is misplaced. Protection arising under the Convention Relating to the

178. *AC (Tuvalu)*, *supra* note 88, [75].

179. Hum. Rts. Comm., Billy v. Australia, Communication No. 3624/2019, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 18, 2023); *Budayeva*, 59 Eur. Ct. H.R. at 59; Verein Klimaseniorinnen Schweiz v. Switzerland, App. No, 53600/20 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206.

180. *See* HATHAWAY & FOSTER, *supra* note 2, at 308-19.

181. *See* ILC, 2024, *supra* note 132, ¶ 251 (stating that with respect to article 2 of the ECHR, "it is unlikely that climate change-induced threats to the right to life would assist an applicant in gaining complementary protection, since a breach of this right, and thus complementary protection, would depend on the requirement that the State of origin had been deficient in its response, in that the environmental harm was caused or perpetrated by the State, and the burden placed on the State to act must be reasonable. Claims based on the right not to be subjected to cruel, inhuman or degrading treatment are equally difficult to establish regarding sea-level rise, as the requirements for complementary protection have been carefully circumscribed such that a State's lack of resources alone would not qualify as grounds for such protection except in the most exceptional of circumstances.").

182. *AW (Kiribati)*, *supra* note 14, at [128].

Status of Refugees (Refugee Convention) (and cognate *non-refoulement* obligations in other treaties) is concerned with the availability of *state* protection that may respond to the risk of harm, not with the actions of other ill-defined groups such as "the international community" and "civil society."[183]

Thirdly, in assessing the role of the home state, and particularly where a claim for international protection is rejected, the onus is on the *decision-maker* to identify the evidence that supports a finding that the risk is below the requisite standard. By concluding that "there is no sufficiently compelling evidence before the Tribunal to establish that existing and future climate change adaptation and disaster risk reduction measures by the successive governments in Kiribati … will not reduce the risk" of harm,[184] the IPT has imposed an "impossible burden" on the applicant.[185] The applicant is effectively required to prove a negative, namely, that possible action by the home state and/or the international community will not be effective to sufficiently mitigate the risk. The *legal* question is whether it *will be* effective, at least to the extent that the risk is below the well-founded test, not whether there is evidence that it will not. In essence, since the harm is not temporally imminent, decision-makers are engaging in hypothetical conjecture that is not consistent with the standard approach to international protection—that is, whether there is a real risk of foreseeable harm.

Fourthly, and relatedly, there is an irony and potential injustice in the rejection of a protection claim on the basis that the home state has not done enough to obviate the harm—harm that has arguably come about because of the carbon emissions of other states, including states in which protection is sought.[186]

In sum, the inherently longer frame perspective required to assess protection claims related to climate change has proven challenging. Yet, as our analysis has shown, the introduction of extraneous factors, inconsistent with standard refugee law, hinders rather than assists in the assessment.

183. See relevant discussion in HATHAWAY & FOSTER, *supra* note 2.

184. *AW (Kiribati)*, *supra* note 14, at [128].

185. *AC (Tuvalu)*, *supra* note 88, at [75].

186. E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Ecological Crisis, Climate Justice and Racial Justice*, U.N. Doc. A/77/549 (Oct. 25, 2022).

B. *Protecting Children from Climate-related Harm*

The existence and scope of states' obligations to take action to prevent and mitigate the effects of climate change are increasingly at issue before international, regional, and domestic courts, and obligations in relation to children are starting to feature prominently. Advisory opinions are pending before the International Court of Justice[187] and the Inter-American Court of Human Rights.[188] At their core, these cases raise fundamental questions about the obligations of governments and policymakers to prevent future harm, including with respect to "involuntary human mobility"[189] and the rights of "[p]eoples and individuals of the present *and future generations* affected by the adverse effects of climate change."[190] As the ECtHR recently observed, "the damaging effects of climate change raise an issue of intergenerational burden-sharing."[191] Further, this applies "both in regard to the different generations of those currently living and in regard to future generations."[192] Likewise, the Request for an Advisory Opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile poses specific questions concerning the "differentiated obligations of States in relation to the rights of children and the new generations."[193] As a preface to these questions, the request "recognizes" the "consensus of the scientific community which identifies children as the group that is most vulnerable in *the long term to the imminent risks to life and well-being* as a result of the climate emergency."[194] The invocation of the word "imminent" here suggests something other than timing; presumably, it relates to the severity of the harm.

While these cases raise novel legal questions,[195] the scope of state responsibility to prevent future harm is not novel in refugee law; rather,

187. *Request for an Advisory Opinion*, ICJ, Mar. 29, 2023, *supra* note 10.

188. *See Request for an Advisory Opinion*, Inter-Am. Ct. H.R., Jan. 9, 2023, *supra* note 11 and corresponding text. *See also* Hum. Rts. Comm., Billy v. Australia, Communication No. 3624/2019, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 18, 2023).

189. *Request for an Advisory Opinion*, Inter-Am. Ct. H.R., Jan. 9, 2023, *supra* note 11, at 13.

190. *Request for an Advisory Opinion*, ICJ, Mar. 29, 2023, *supra* note 10, at 3 (emphasis added).

191. Verein Klimaseniorinnen Schweiz v. Switzerland, App. No, 53600/20, ¶ 410 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206.

192. *Id.* ¶ 420.

193. *Request for an Advisory Opinion*, Inter-Am. Ct. H.R., Jan. 9, 2023, *supra* note 11, at 10, IV(C).

194. *Id.* (emphasis added).

195. On the potential scope for the ICJ opinion to consider displacement, see Jane McAdam, *How the ICJ Could Shape Protection for People Displaced in the Context of Climate Change*, RESEARCHING INTERNAL DISPLACEMENT (Jan. 24, 2024), https://researchinginternaldisplacement.org/short_pieces/how-the-icj-could-shape-protection-for-people-displaced-in-the-context-of-climate-change/.

it is at the heart of this area of law, as explored above. In the following subsection, we consider the parameters of international protection obligations in relation to claims involving children. We argue that the longer timeframe inherently required to assess protection claims by children can—and should—inform the development of protection obligations in relation to children in the context of climate-related harm. We first outline the broad trends in relation to protection claims by children before turning to two issues that have attained prominence in the context of climate justice: (1) the notion of responsibility to protect future generations and (2) the question of psychological harm caused by climate anxiety.

1. Children and Future Harm in International Protection: General Trends

The scope and nature of states' *non-refoulement* obligations in refugee and human rights law have largely been determined through an examination of protection claims brought by adults.[196] Children are most often subsumed within a family's claim and are granted protection on a derivative basis. Nonetheless, over recent decades, the need for a child-specific approach to determining protection from removal to future harm has been recognized and explored.[197] The importance of a nuanced and child-specific approach to determining all aspects of the refugee definition, including the level of serious harm necessary to constitute "being persecuted," has received judicial and scholarly attention.[198] Yet jurisprudence or scholarship to date has not thoroughly addressed the question of the appropriate timeframe for assessing future harm in the case of children and whether it should extend beyond that normally applied in the context of adult applicants. This subsection draws upon our analysis of the (implied or explicit) notion of "imminence" in international protection jurisprudence to reveal that a child-specific approach to this question is emerging that tests the outer limits of "reasonable foreseeability."

It has long been recognized in principle that a child may be entitled to protection if they have a well-founded fear of being persecuted, even where that persecution may not eventuate for a significant period of

196. Jason M. Pobjoy, The Child in International Refugee Law 116 (2017).

197. *E.g. id.*; Jacqueline Bhabha & Mary Crock, Seeking Asylum Alone - A Comparative Study: Unaccompanied and Separated Refugee Protection in Australia, the UK, and the US (2007).

198. Pobjoy, *supra* note 196, at 116-22. For earlier analysis, see Michelle Foster, International Refugee Law and Socio-Economic Rights: Refuge from Deprivation (2008).

time. For example, a fear of being subjected to female genital mutilation is well accepted across a wide range of jurisdictions as constituting persecution, regardless of the age at which the applicant seeks protection.[199] Likewise, the question of subjection to socio-economic harm almost always requires an assessment of harm well into the future. In this regard, UNHCR's Guidelines on International Protection concerning child asylum claims emphasize that "[w]hile it is clear that not all discriminatory acts leading to the deprivation of economic, social and cultural rights necessarily equate to persecution, it is important to assess the consequences of such acts for each child concerned, now and in the future."[200]

Of course, the question is what precisely does "in the future" mean, and, specifically, is there an outer limit? The (limited) case law is not consistent, but where decision-makers have been presented with a claim that squarely pushes the outer limits of foreseeability, they have tended to recognize that a longer frame view may well be necessary in the case of children. Such cases have almost all concerned the deprivation of social and economic rights, and implicitly accept that the unique development needs of children require a longer frame of analysis.

In the context of family planning policies that prevent certain children from being registered, and thus deprived of essential social and economic rights, Australian courts have implicitly rejected any attempt to impose a temporal "imminence" test. This is consistent with their insistence on "reasonable foreseeability" as the appropriate (open-ended) test.[201] For example, the Federal Court of Australia found the Refugee Review Tribunal to be in error on the basis that it should have considered "a real chance that [the applicant's] household registration would not occur for a period of time sufficiently long, during which he would be denied access to State services ordinarily provided to children and citizens, so that he would suffer serious and systemic discrimination."[202]

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199. *See* Anderson et al., 2020, *supra* note 8, at 174.

200. UNHCR, *Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1 (F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, ¶ 36, HCR/GIP/09/08 (Dec. 22, 2009) [hereinafter UNHCR Guidelines on Child Asylum Claims].

201. *See* Anderson et al., 2020, *supra* note 8, at 162 n.36, referring to *AOX16 v Minister for Immigr & Border Prot* [2019] FCCA 132, ¶ 24 (Austl.); *Minister for Immigr & Ethnic Affs v Wu Shan Liang* (1996) 185 CLR 259, 279 (Austl.); *MZYXR v Minister for Immigr & Citizenship* [2013] 141 ALD 276, 283 (Austl.); *DUX16 v Minister for Immigr & Border Prot* [2018] FCA 1529, ¶ 22 (Austl.).

202. *SZJTQ v Minister for Immigr & Citizenship* [2008] FCA 1938, ¶¶ 57 (Austl.). For more recent examples, see *1716847 (Refugee)* [2020] AATA 1545, ¶ 16 (Austl.); *1515288 (Refugee)* [2019] AATA 4066, ¶ 114 (Austl.).

In New Zealand, the term "imminent" continues to creep into decision-making, sometimes as a basis for rejecting a claim, although the IPT does refer to the foreseeable future[203] or considers "foreseeable prospects"[204] on return. However, unlike in Australia, foreseeability is rarely explicitly invoked in New Zealand decisions. Even so, the IPT has been willing to consider a longer timeframe for children. For example, in relation to a minor applicant from China,[205] the IPT decided that the risk of a breach of religious rights would eventuate on a "medium-term horizon," that is, a few years into the future.[206] In another case, the IPT accepted the claim of two child applicants based in part on the persecutory denial of university education, notwithstanding that "the son is still some years short of this being imminent for him."[207] The risk of physical harm was found likely to increase as the appellant aged, also implying a consideration of harm well into the future.

In Canada, imminence is not generally invoked to reject a claim on the basis that harm will occur too far into the future,[208] but neither is there much analysis of the scope of the foreseeable future. Very few cases appear to turn on the period of assessment. One noteworthy exception concerned the rejection of a protection claim by Hungarian Roma parent applicants but also a finding that their child satisfied the criteria for refugee status precisely because of the child's long-term prospects. As the Immigration and Refugee Board explained,

> XXXX is XXXX years old, 35 years younger than each of his parents. The future risk of discrimination which he faces is thus significantly longer than the one facing his parents. He has not yet completed his education. Given this fact and his age, I weigh the cumulative aspect of the future discrimination he faces as a Roma in Hungary as amounting to more instances of discrimination, with more multiplying and long-lasting

203. *AQ (Iraq)* [2017] NZIPT 801106 (N.Z.).

204. *BL (South Africa)* [2016] NZIPT 800968 at [85] (N.Z.) (in relation to socio-economic harm).

205. *DJ (China)* [2018] NZIPT 801242 at [1] (N.Z.).

206. *Id.* at [62].

207. *ES (Iran)* [2020] NZIPT 801798 at [54] (N.Z). *See also CT (South Africa)* [2020] NZIPT 801643 (N.Z).

208. One of the factors Canadian decision-makers use to determine whether it was reasonable for an applicant not to seek state protection is the imminence of the risk. If harm is imminent, it lessens responsibility to seek protection. *See* Losada Conde v. Canada (Minister of Citizenship and Immigr.), 2018 FC 1165 (Can.) (abduction of a similarly situated person); X (Re), 2017 CanLII 55358 (Can. C.A. I.R.B.) (threatened at gunpoint).

> effects on his life than in the case of his parents. For this reason, I find that, in his particular case, with a life whose possibilities are still theoretically more open to different directions and outcomes than his parents', what he faces is cumulative discrimination that does amount to persecution.[209]

In this case, the fact that the child's life might take "different directions and outcomes"[210]—what could be described as "intervening acts"—did not preclude a finding that they had a well-founded fear of being persecuted; rather, these factors *strengthened* the claim. Thus, while it is fair to say there is little case law that specifically explores the outer limits of the "reasonably foreseeable future," decision-makers have displayed a propensity to accept a longer-frame view in the case of children, especially where the harm potentially impacts human development, as is the case in relation to socio-economic rights.

Turning to *non-refoulement* obligations beyond the Refugee Convention, most relevant for this context is that a *non-refoulement* obligation is implicit in the Convention on the Rights of the Child (CRC).[211] This applies, but "is by no means limited to … articles 6 and 37 of the Convention."[212] Article 6(1) embodies the commitment that "every child has the inherent right to life," but importantly, Article 6(2) extends the obligation to the requirement that states parties shall ensure "to the maximum extent possible the survival and development of the child."[213]

The Committee on the Rights of the Child has adopted an approach to assessing future harm that errs on the side of protection of this expanded view of the right to life and is consistent with the "best interests of the child" principle.[214] Interestingly, the Committee has also considered the relevance of the precautionary principle, derived from environmental law (as discussed in Section II.C above), and specifically as it applies to international protection. In elucidating a state's obligation not to remove a (non-citizen) child in certain circumstances, the Committee has emphasized that the risk of a relevant human rights

209. X (Re), 2015 CanLII 109287, ¶ 45 (Can. C.A. I.R.B.).

210. *Id.*

211. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; *see generally* JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 173-96 (2007); POBJOY, *supra* note 196.

212. Comm. on the Rts. of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

213. CRC, *supra* note 211, art. 6.

214. *Id.* art. 3.

violation "should be assessed in accordance with the principle of precaution,"[215] although it has not elaborated on what precisely that entails in this context. The key point appears to be an acceptance that uncertainty is inherent in such cases, and that timing is scarcely relevant where there is a real risk of serious harm. For example, the Committee has explained that assessing a claim for international protection requires an examination of whether treatment essential for the "proper development of the child" would be "available and accessible"[216] in the home state, indicating a long-range view of future harm.

This jurisprudence is consistent with and reinforces refugee law's doctrine of foreseeability, suggesting that international law can be understood to encompass an obligation to protect against the removal of children on the basis of harm that may eventuate well into the future, assuming other elements are satisfied.

The cases discussed so far pertain to the principle of *non-refoulement*—that is, they elucidate limits on states' ability to remove a child on the basis of foreseeable harm. Such cases have sometimes been described as involving questions of extraterritorial application of human rights principles, but this is not technically correct, as the obligations arise due to the presence *within* territory (or jurisdiction) of a person to whom the state may owe an obligation of *non-refoulement*. Before turning more specifically to the climate context in the next subsection, it is worth pausing to observe that the Committee has recently considered whether a state may have positive duties to protect *extraterritorially*. The cases have concerned the potential repatriation of citizens and their children from camps in north-eastern Syria.[217]

Considering whether France had jurisdiction in this context, the Committee found that it did because it had "the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses."[218] This was

215. Comm. on the Rts. of the Child, D.R. v. Switzerland, Communication No. 86/2019, ¶ 11.3, U.N. Doc. CRC/C/87/D/86/2019 (May 31, 2021).

216. *Id.* ¶ 11.6. *See also* Comm. on the Rts. of the Child, W.M.C. v. Denmark, Communication No. 31/2017, ¶¶ 8.3-8.9, U.N. Doc. CRC/C/85/D/31/2017 (Sept. 28, 2020).

217. Comm. on the Rts. of the Child, L.H. v. France, Communications No. 79/2019 and No. 109/2019, U.N. Doc. CRC/C/85/D/79/2019-CRC/C/85/D/109/2019 (Sept. 30, 2020). *See also* Comm. on the Rts. of the Child, F.B. v. France, Communication No. 77/2019, U.N. Doc. CRC/C/86/D/R.77/2019 (Feb. 4, 2021); Comm. on the Rts. of the Child, P.N. v. Finland, Communication No. 100/2019, ¶ 1.1, U.N. Doc. CRC/C/91/D/100/2019 (Sept. 12, 2022) (verbatim).

218. L.H. v. France, ¶ 9.7, U.N. Doc. CRC/C/85/D/79/2019-CRC/C/85/D/109/2019; F.B. v. France, ¶ 8.8, U.N. Doc. CRC/C/86/D/R.77/2019. *See also* P.N. v. Finland, ¶ 10.9, U.N. Doc.

based in part on the finding that the detention conditions experienced in the camps "pose[d] an imminent risk of irreparable harm to the children's lives, their physical and mental integrity and their development."[219] Thus, the combined effect of the circumstances of the victims (namely, extremely vulnerable children at imminent risk of irreparable harm) and the state's capability and power to protect (through repatriation of its nationals) led the Committee to find that France had jurisdiction over the children.[220] In its decision on the merits, the Committee found that "the failure of the State party to protect the child victims against an imminent and foreseeable threat to their lives," namely, the detention conditions experienced in the camps, amounted to a violation of Article 6(1) of the CRC (the right to life);[221] that it had an impact on the children's development; and that it constituted cruel, inhuman, or degrading treatment or punishment in violation of Articles 3 and 37(a) of the CRC.[222] In the similar case of *P.N. v. Finland*, the Committee found that Finland had "a positive obligation to protect these children from an imminent risk of violation of their right to life and an actual violation of their right not to be subjected to cruel, inhuman or degrading treatment."[223] They were said to "face an imminent risk of death" because they were living in "inhuman sanitary conditions, lack [ing] basic necessities, including water, food and health care."[224]

CRC/C/91/D/100/2019. A state "may also have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders," and in the migration context, "States should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection." F.B. v. France, ¶ 8.6, U.N. Doc. CRC/C/86/D/R.77/2019; P.N. v. Finland, ¶ 10.8, U.N. Doc. CRC/C/91/D/100/2019. *See also* Comm. Against Torture, P.D. v. France, Communication No. 1045/2020, U.N. Doc. CAT/C/78/D/1045/2020 (Nov. 3, 2024).

219. L.H. v. France, ¶ 9.7, U.N. Doc. CRC/C/85/D/79/2019-CRC/C/85/D/109/2019; P.N. v. Finland, ¶ 10.9, U.N. Doc. CRC/C/91/D/100/2019.

220. Helen Duffy, *French Children in Syrian Camps: The Committee on the Rights of the Child and the Jurisdictional Quagmire*, LEIDEN CHILD.'S RTS. OBSERVATORY (Feb. 18, 2021), https://www.childrensrightsobservatory.nl/case-notes/casenote2021-3. Duffy criticizes the Committee's decision for failing to refer explicitly to existing standards, such as "effective control" or the "direct and foreseeable impact" of the decision not to intervene on the children's rights and seriousness of the harm, reflecting General Comment No. 36, *supra* 156, at ¶ 15, where the U.N. Human Rights Committee underscores both foreseeability and seriousness of the harm," thereby undermining legal certainty and normative clarity.

221. F.B. v. France, ¶ 8.9, U.N. Doc. CRC/C/86/D/R.77/2019; *see* P.N. v. Finland, ¶ 11.5, U.N. Doc. CRC/C/91/D/100/2019.

222. F.B. v. France, ¶ 3.4, U.N. Doc. CRC/C/86/D/R.77/2019; P.N. v. Finland, ¶ 11.6, U.N. Doc. CRC/C/91/D/100/2019.

223. P.N. v. Finland, ¶ 11.7, U.N. Doc. CRC/C/91/D/100/2019 (citing F.B. v. France, ¶ 6.9, U.N. Doc. CRC/C/86/D/R.77/2019 (verbatim in French)).

224. P.N. v. Finland, ¶ 11.4, U.N. Doc. CRC/C/91/D/100/2019, which matches F.B. v. France, ¶ 6.5, U.N. Doc. CRC/C/86/D/R.77/2019.

The language of "imminent risk of irreparable harm" in the admissibility decisions[225] is consistent with the test used by human rights bodies in assessing admissibility in *non-refoulement* cases, although its application to the extraterritorial obligations of states appears to operate as an extension of the principle. Yet, it is not clear what the meaning of "imminent" is in that context; the children had been in camps for a long period, and the harm that constituted a threat to their integrity and development would materialize over a very lengthy period. Thus, "imminence" appears to be less about temporal urgency and more about the severity of the harm. While imminence in this context was invoked to expand rather than contract a state's obligations to protect (i.e., to protect extraterritorially), the ambiguity and inconsistent use of the term suggests that it would best be dispensed with.

In the next subsection, we draw on the analysis above to assess how decision-makers might navigate cases concerning claims by children in the context of climate-related displacement.

2. The Protection of "Future Generations" from Climate-related Harm

How might these trends apply in the context of climate-related displacement? The limited case law examining the scope of international protection obligations in this context, discussed above in Section III.A, has largely concerned adults. In this subsection, we consider whether the obligation of protection is or should be differently constituted where the claim is focused on children. Before doing so, however, we pause to clarify that our invocation of the term "future generations" is used to signal that there may well be a distinctive approach required for assessing the risk of climate-related harm in relation to children. We acknowledge that the question of the responsibility of present generations to future generations has fostered an especially lively debate in academic scholarship[226] and also in policy, with the establishment of an "Ombudsman for Future Generations" in some countries.[227] Even more

225. L.H. v. France, ¶ 9.7, U.N. Doc. CRC/C/85/D/79/2019-CRC/C/85/D/109/2019; P.N. v. Finland, ¶ 10.9, U.N. Doc. CRC/C/91/D/100/2019.

226. *See, e.g.*, Bridget Lewis, *Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice*, 34 NETH. Q. HUM. RTS. 206, 207 (2017). *See also* Margaretha Wewerinke-Singh, Ayan Garg, & Shubhangi Agarwalla, *In Defence of Future Generations: A Reply to Stephen Humphreys*, 34 EUR. J. INT'L L. 651,658 (2023).

227. *See, e.g.*, ALAPVETŐ JOGOK BIZTOSÁNAK HIVATALA [OFF. OF THE COMM'R FOR FUNDAMENTAL RTS. OF HUNGARY], https://www.ajbh.hu (last visited Mar. 6, 2025). *See also* Ludvig Beckman & Fredrik Uggla, *An Ombudsman for Future Generations: Legitimate and Effective? in* INSTITUTIONS FOR FUTURE GENERATIONS (Iñigo González-Ricoy & Axel Gosseries eds., 2016).

fascinating is the fact that more than eighty constitutions globally contain "some reference to the rights or interests of future generations or the need to preserve natural resources for the benefit of future people."[228] In refugee law, however, it would be inconceivable that a claim for protection could be made out on the basis of harm to a person not yet born; our focus here is on children whose dignity and core human rights are likely to suffer greatly at a future indeterminate time due to the impacts of climate change. Any emerging doctrine of responsibility for future generations in other contexts is not strictly relevant but does situate the evolution of refugee law within a wider trend of assessing the future impacts of current actions.

Overall, while there is case law across a range of jurisdictions that supports a long-range assessment of future harm in children's protection claims in general, there is almost no guidance concerning the particular context of climate-related displacement. UNHCR's guidance on international protection in the context of climate change and disasters emphasizes that an assessment of qualification for refugee status "requires a forward-looking assessment,"[229] through which "it is important to understand that impacts may emerge suddenly or gradually,"[230] and that such impacts may "overlap temporally and geographically; vary in intensity, magnitude and frequency and persist over time."[231] Yet, there is no reference to children at all in this context. This guidance is repeated in UNHCR's amicus brief in the request for an Advisory Opinion in the Inter-American Court of Human Rights, discussed above, in which it is emphasized that "populations may be gradually or immediately affected or suffer longer-term diminutions in their enjoyment of human rights" and that violations of human rights may be at risk "in the short term and longer-term."[232] The brief specifically addresses the vulnerability of children, noting the high number of children at risk and already displaced, and emphasizes that the adverse effects of climate change can impact a broad array of human rights, including the rights to education and health, and can expose children

228. Francesco Gallarati, *The Future Rights of Present Generations: A New Paradigm of Intergenerational Justice?*, IACL-AIDC BLOG (Jan. 19, 2023), https://blog-iacl-aidc.org/2023-posts/2023/1/19/the-future-rights-of-present-generations-a-new-paradigm-of-intergenerational-justice.

229. UNHCR Legal Considerations, *supra* note 89, ¶ 9.

230. *Id.*

231. *Id.*

232. OFF. OF THE UNHCR, AMICUS BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS REGARDING THE REQUEST FOR AN ADVISORY OPINION ON THE CLIMATE EMERGENCY AND HUMAN RIGHTS FROM THE REPUBLIC OF COLOMBIA AND THE REPUBLIC OF CHILE ¶ 36. (Dec. 18, 2023).

to sexual violence and trafficking, poverty, and malnutrition.[233] While the brief does not deal in any detail with the question of foreseeability or timing, the guidance clearly suggests a longer frame of analysis for assessing the claims of children in this context.

Turning to the case law, as explained above, by far the deepest examination of these issues has occurred in New Zealand. It is interesting to consider, then, what, if anything, the case law emerging from the New Zealand tribunals and courts can offer this analysis. In the 2014 decision of *AC (Tuvalu)*, the evidence of the adult applicants had emphasized that both parents were "particularly anxious about the effect on [their] children of having to drink contaminated and substandard water,"[234] and they were "anxious for [their] children's future in Tuvalu."[235] The IPT accepted that, by reason of their young age, the children "[we]re inherently more vulnerable to the adverse impacts of natural disasters and climate change than their adult parents," but rejected their *non-refoulement* claim on the basis that "the Government of Tuvalu is sensitised to the specific vulnerabilities of children," such that the children "are not in danger of being arbitrarily deprived of their young lives . . . [or] in danger of being subjected to cruel, inhuman or degrading treatment."[236] It is not clear precisely how the "sensitization" of the government of the home state could negate a claim to protection; presumably, this turns on the issue discussed above, namely, the (arguably misplaced) focus on the role of the country of origin.

In *AF (Kiribati)*, decided one year earlier and ultimately the subject of the seminal *Teitiota* decision of the U.N. Human Rights Committee, the applicant mother was "particularly concerned for the safety of her children" on the basis of their age (as young as six months old) and the fact that she had "heard stories of children getting diarrhoea and even dying because of problems associated with the poor drinking water."[237] The expert witness in the case supported this concern and explained that there were "health problems for young children, in particular because of the salt water intrusion"; there had "been increases in cases of diarrhoea in children and some deaths ha[d] been reported."[238] However, the specific claims of the children were not assessed (presumably because it was a "derivative" claim); instead, the applicant's claim

233. *Id.* ¶¶ 113-15.
234. *AC (Tuvalu)*, *supra* note 88, at [28].
235. *Id.* at [32].
236. *Id.* at [119].
237. *AF (Kiribati)*, *supra* note 79, at [33].
238. *Id.* at [19].

failed because he could not "establish that there [was] a sufficient degree of risk to his life, or that of his family, *at the present time*."[239]

In neither of these cases were the children's claims assessed in their own right, and certainly not with a view to assessing the foreseeability of harm from a longer-term perspective. Nor were the children's claims examined meaningfully by the majority in *Teitiota*.[240] The dissenting opinions of Committee members Vasilka Sancin and Duncan Laki Muhumuza suggest that greater consideration could (and should) have been given to the particular position of Mr. Teitiota's children. While the majority appeared not to consider the children's circumstances at all (presumably because they characterized the claim as being only about the author, Mr. Teitiota), the dissenting opinions considered the wider family as well. Sancin found that the state party (New Zealand) had not properly assessed the impact on the applicant and his dependent children of a lack of access to safe drinking water in Kiribati, while Muhumuza pointed to the facts that "the author and his family . . . ha[d] had bad health issues" and that "the child of the author ha[d] already suffered significant health hazards on account of the environmental conditions."[241] In particular, he focused on the fact that "climate change constitute[s] extremely serious threats to the ability of both present and future generations to enjoy the right to life."[242]

The need for a specific and age-sensitive examination of the discrete claims by children in this context was recognized by the Committee on the Rights of the Child in the case of *Sacchi v. Brazil*, in which several minor applicants claimed that Brazil had violated multiple articles of the CRC "by failing to prevent and mitigate the consequences of climate change."[243] While this was not an international protection case

239. *Id.* at [89] (emphasis added).

240. *See* Jane McAdam, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement*, 114 AM. J. INT'L L. 708, 716-17 (2020). In a case concerning the future impacts of climate change on the rights of children in Tuvalu, New Zealand's IPT accepted that "by reason of their young age," the children were "inherently more vulnerable to the adverse impacts of natural disasters and climate change than their adult parents," but found that the government of Tuvalu was "sensitised to the specific vulnerabilities of children such that the appellant children in this case are not in danger of being arbitrarily deprived of their young lives if returned to Tuvalu, and they are not, as children, in danger of being subjected to cruel, inhuman or degrading treatment." *AC (Tuvalu)*, *supra* note 88, at [119].

241. Hum. Rts. Comm., Teitiota v. New Zealand, Communication No. 2728/2016, Annex II, ¶ 5, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) (dissent of Committee Member Muhumuza).

242. *Id.* ¶ 4.

243. Comm. on the Rts. of the Child, Sacchi v. Brazil, Communication No. 105/2019, ¶ 1.1, U. N. Doc. CRC/C/88/D/105/2019 (Sept. 22, 2021).

involving the prospect of removal, it is nonetheless relevant because the Committee was required to consider whether the applicants had justified, for the purposes of establishing jurisdiction, that the impairment of any rights was reasonably foreseeable. While the case was deemed inadmissible on other grounds, the Committee reasoned as follows to support its finding of reasonable foreseeability:

> The Committee considers that, as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to affect them throughout their lifetimes, particularly if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection, *States have heightened obligations to protect children from foreseeable harm*.[244]

In sum, this analysis suggests that established doctrine pertinent to assessing states' *non-refoulement* obligations in relation to children is capable of responding to the challenges of climate-related displacement. This, however, requires decision-makers to apply the well-established principles relating to (1) the heightened vulnerability of children; (2) the need for a long-term approach to assessing foreseeability; and (3) the best interests of the child principle, which supports a precautionary approach. Further, it is imperative that decision-makers not fall into the traps of insisting on imminence (particularly in the sense of timing) or focusing incorrectly on the responsibility of the home state—a relevant, but certainly not necessary, factor in assessing international protection claims.

3. "Climate Anxiety" and Psychological Harm: A New Frontier in Refugee Protection?

In the subsection above, we examined the particularities of protection claims involving children in the context of climate change. An important emerging ancillary issue is the identification of climate anxiety as a psychological condition, particularly affecting children. In the final subsection of this Article, we consider the extent to which this may be relevant to assessing claims for international protection.

We begin by examining general principles concerning psychological harm as a form of persecution before considering whether, and to what

244. *Id.* at ¶ 10.13 (emphasis added).

extent, climate anxiety may give rise to a well-founded fear of persecution or other serious harm. Given the nature of this condition—fear about the future impacts of climate change—questions of foreseeability and timing are central to its assessment in the context of international protection.

In principle, it is well accepted that psychological harm can constitute serious harm—both with respect to persecution in refugee law and cruel, inhuman, or degrading treatment in human rights law. As James Hathaway and Michelle Foster observe, "it is appropriate to recognise as serious harm action that is likely to cause serious psychological harm to the applicant."[245] The European Union's Qualification Directive explicitly provides that "acts of persecution" can take the form of "acts of physical *or mental violence*,"[246] and there is similar authority in the United States and Australia.[247] Likewise, UNHCR guidance has explicitly recognized both the relevance of psychological harm to assessing qualification for protection, as well as the inherently longer-term analysis relevant to examining such harm. In its Guidelines on International Protection in relation to situations of armed conflict, UNHCR observes that protracted armed conflict and violence "can have serious deleterious effects on the physical and psychological health of applicants."[248] Most relevantly for present purposes, it states that for certain people, such as victims of sexual and gender-based violence, psychological harm "may continue long after the initial violent act was committed and the situation of armed conflict and violence has ended."[249]

In relation to children, UNHCR's Guidelines on International Protection concerning child asylum claims note that,

245. HATHAWAY & FOSTER, *supra* note 2, at 218.

246. Qualification Directive, *supra* note 87, art. 9(2)(a) (emphasis added).

247. In the United States, psychological harm alone may be sufficient to amount to persecution. *See* Ouk v. Gonzales, 464 F.3d 108, 111 (1st Cir. 2006); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 2004); REFUGEE, ASYLUM, AND INT'L OPERATIONS DIRECTORATE, U.S. CITIZENSHIP AND IMMIGR. SERVS., RAIO FOUNDATIONS TRAINING PROGRAM: DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION, § 3.7 (2023), https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf; *SCAT v Minister for Immigr & Multicultural & Indigenous Affs* [2003] FCAFC 80, ¶ 21 (Austl.) ("I do not think it could be doubted that serious psychological harm, particularly harm involving mental illness, could constitute 'serious harm' within the meaning of s 91R.").

248. UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, HCR/GIP/16/12 (Dec. 2, 2016).

249. *Id.* ¶ 27.

> In the case of a child applicant, psychological harm may be a particularly relevant factor to consider. Children are more likely to be distressed by hostile situations, to believe improbable threats, or to be emotionally affected by unfamiliar circumstances. Memories of traumatic events may linger in a child and put him/her at heightened risk of future harm.[250]

While these principles concerning psychological harm as a form of persecution are well established in theory, few cases have examined this issue in depth, perhaps due to the fact that claims involving psychological harm rarely rest solely on such harm. An exception is provided in *OF (India)*, where the New Zealand IPT observed in the context of assessing a claim centered on gender-based violence that,

> The long body of a threat may span a spectrum of time comprising past, present and future. Take, for example, a death threat directed into the future. The emotional anguish and apprehension of harm triggered by a threat can also resonate well into the future (which is indeed the intention of the perpetrator), irrespective of whether, or not, there is any real chance that the threatened act will be implemented.[251]

And further,

> Here, we appreciate that violence consists not solely of direct, concrete acts, such as physical and emotional abuse, but in the "experience of anticipating violence". In the manner that the full rendition of a song or symphony may be recalled from a few stray notes, coerced women live under the threat of future violence, the somewhat invisible harm to women in a relationship of subjugation. Direct and indirect threats, as forms of psychological harm, may induce protracted psychological states. There is a latency to violence and threats where the arc of a threat and the harm it engenders can trail long after its aim at a victim.[252]

This insightful analysis suggests caution in artificially limiting the timeframe for assessing future psychological harm, given both its

250. UNHCR Guidelines on Child Asylum Claims, *supra* note 200, ¶ 16.

251. *OF (India)*, *supra* note 103, at [133].

252. *Id.* at [124].

potential long-lasting effects and the fact that it can develop in relation to a latent physical harm.

In light of these general principles concerning psychological harm, we now turn to consider the relevance of the condition of climate anxiety to international protection claims. While "climate anxiety" is not yet formally recognized as a mental illness,[253] there is a developing body of research supporting its recognition. Joseph Dodds explains that "the American Psychological Association refers to ecoanxiety as 'a chronic fear of environmental doom,' ranging from mild stress to clinical disorders like depression, anxiety, post-traumatic stress disorder and suicide, and maladaptive coping strategies such as intimate partner violence and substance misuse."[254]

The emerging consensus is that "[c]limate anxiety is being felt much more powerfully among the young."[255] As Susan Clayton observes,

> Children may experience the strongest effects. Children are already more vulnerable to effects of the direct experience of climate change. On average they have stronger responses to extreme weather events, such as PTSD, depression, sleep disorders, etc., partly due to their greater dependence on adult family members and social support networks that might be disrupted by the event .... They are also more vulnerable to heat due to their bodies' incompletely developed ability to thermoregulate .... Of particular concern is the possibility for long-term and/or permanent effects of early experiences of trauma, which can impair children's ability to regulate their own emotions and can lead to learning or behavioral problems. Early stress can also increase the risk of mental health problems later in life ....[256]

While this scientific research does not appear to have been presented as part of a claim for international protection anywhere in the world to date, it has received attention from the Committee on the Rights of the Child. In its 2023 General Comment on children's rights and the environment, with a special focus on climate change, it observed that "[t]he clear emerging link between environmental harm and children's

253. Fiona Charlson & Tara Crandon, *Is "Climate Anxiety" a Clinical Diagnosis? Should It Be?*, U. QUEENSL. SCH. PUB. HEALTH (Mar. 28, 2023), https://public-health.uq.edu.au/article/2023/03/%E2%80%98climate-anxiety%E2%80%99-clinical-diagnosis-should-it-be.

254. Joseph Dodds, *The Psychology of Climate Anxiety*, 45 BJPSYCH BULL. 222, 222 (2021).

255. *Id.*

256. Susan Clayton, *Climate Anxiety: Psychological Responses to Climate Change*, 74 J. ANXIETY DISORDERS 1, 1-2 (2020).

mental health, such as depression and eco-anxiety, requires pressing attention."[257] It is certainly conceivable that such evidence could plausibly form part of an international protection claim in the future. In this regard, there are at least two issues worth noting. The first is that the relevant climate anxiety would need to relate specifically to the country of origin. If it were generalized, then it would be difficult to see how it would give rise to a *non-refoulement* claim; allowing a person to stay in a country of asylum would do nothing to alleviate generalized anxiety about global warming.[258] By contrast, a specific anxiety related to the country of origin could be assessed in accordance with the general principles, noted above, concerning psychological harm as a form of persecution.

The second, and potentially more complex, issue relates to how such harm could be understood as persecution and/or cruel, inhuman, or degrading treatment in the *non-refoulement* context. While it has been convincingly argued that existing psychological harm "could be construed as a violation of the prohibition of torture and inhuman and degrading treatment and punishment,"[259] analogous to the "death row phenomenon" in *Soering v. United Kingdom*,[260] one sub-issue that remains is whether it would be necessary to attribute this harm to the responsibility of the home state. In this context, such a claim could be analogized to the line of cases emanating from *D. v. United Kingdom*, in which return to a serious risk to life was found to engage a state's *non-refoulement* obligations notwithstanding the fact that there was no obvious perpetrator.[261] This

257. U.N. Comm. on the Rts. of the Child, General Comment No. 26 (2023) on Children's Rights and the Environment, with a Special Focus on Climate Change, ¶ 41, U.N. Doc. CRC/GC/26 (2023).

258. "[G]iven the fact that almost anyone could have a legitimate reason to feel some form of anxiety linked to the risks of the adverse effects of climate change in the future, [it] would make it difficult to delineate the actio popularis protection – not permitted in the [European] Convention system – from situations where there is a pressing need to ensure an applicant's individual protection from the harm which the effects of climate change may have on the enjoyment of their human rights." Carême v. France, App. No. 7189/21, ¶ 84 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233174 (although this is not a refugee case, we note these pertinent comments).

259. Helen Keller & Corina Heri, *The Future is Now: Climate Cases Before the ECtHR*, 40 NORDIC J. HUM. RTS. 153, 156 (2022). *See also* Natasa Mavronicola, *The Future is a Foreign Country: Rethinking State Behaviour on Climate Change as Ill-Treatment*, UNIV. OF BIRMINGHAM (Sept. 2021), https://www.birmingham.ac.uk/research/climate/climate-publications/new-approaches/the-future-is-a-foreign-country-rethinking-state-behaviour-on-climate-change-as-ill-treatment.aspx.

260. *See, e.g.*, Mavronicola, *supra* note 259.

261. D. v. United Kingdom, App. No. 30240/96, ¶ 55 (May 2, 1997), https://hudoc.echr.coe.int/fre?i=001-58035.

would presumably require a very high level of risk in order to fall within this principle.

As the ECtHR explained in *D. v. United Kingdom*, in light of the "fundamental importance" and "absolute character" of Article 3 of the ECHR, it was entitled to

> scrutinis[e] an applicant's claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art. 3).[262]

While the test had been assumed to require "imminence of death" before a person warranted protection,[263] it has subsequently been clarified that the question is whether a person "will be exposed to conditions [on return] resulting in intense suffering *or* to a significant reduction in his life expectancy."[264] These cases will, of course, be exceptional, and yet it is conceivable that climate anxiety could well constitute such a risk—either alone or in conjunction with the physical manifestations of climate change.

In sum, the emergence of a child-specific approach to the question of future harm in the context of climate change is testing the outer limits of the "reasonably foreseeable future." For the reasons explained above, in our view, a long-term, precautionary approach should be taken when assessing foreseeability in international protection claims concerning children.

IV. Conclusion

This Article was prompted by the realization that a creeping notion of "imminence" is applied in some protection cases to limit states' *non-refoulement* obligations. Yet, there is nothing in either the "well-founded fear" test in international refugee law or the "real risk" test in international human rights law that requires harm to be "imminent" for such obligations to be engaged. Part II of this Article highlighted the confusion surrounding the notion of "imminence" in international law through an examination of its different meanings (temporal and non-

262. *Id.* ¶ 49.

263. Ainte (Material Deprivation–Art 3–AM (Zimbabwe)) [2021] UKUT 203, [62] (U.K.).

264. *Id.* (explaining the impact of Paposhvili v. Belgium, App. No. 41738/10, (Dec. 13, 2016), https://hudoc.echr.coe.int/fre?i=001-169662).

temporal) in a range of areas of international law (self-defense, peacekeeping, international environmental law, and international human rights law). Of note was the reliance on a precautionary approach in international environmental law and international human rights law, casting doubt on the usefulness of a notion of "imminence." Part III of the Article explored two contemporary interrelated contexts in which the different meanings of imminence (temporal and non-temporal) have been used. The first concerned the extent to which a *future* risk of disasters and climate change impacts (in contrast to past or ongoing risks) may be grounds for a protection claim *now*. The second context concerned claims by children in the context of *future* climate-related harm, including emerging questions about the responsibility to protect future generations and psychological harm caused by climate anxiety. The nascent application of the precautionary principle in international protection claims relating to children in the context of climate-related harm was of particular interest.

Drawing on illustrative examples, this Article showed how "imminence" is increasingly being (mis)used by decision-makers to deny protection to people at risk of future harm. Even though reasonable speculation about future events is a standard element of refugee status determination, uncertainty about how the impacts of climate change will be felt in particular contexts—and experienced by particular individuals—has arguably been elevated in climate cases such that protection has been denied because that harm is not yet "imminent" and other factors could intervene to mitigate it. That the notion of "imminence"[265] has been used to delimit states' international protection obligations to a *more* immediate timeframe[266] is particularly curious given that the Supreme Court of the Netherlands has defined "climate change as a real and imminent threat,"[267] and the Republic of Colombia and

265. Our analysis of the refugee jurisprudence across multiple jurisdictions shows that decision-makers tend to consider the nature, extent, timing, and/or severity of past harm as a guide to assessing: (1) future risk; (2) the extent to which the harm is already manifesting; (3) the degree to which the risk is individualized (or personally targeted); and (4) any evidence that corroborates the anticipated consequences of the harm.

266. Hum. Rts. Comm., Teitiota v. New Zealand, Communication No. 2728/2016, ¶¶ 6.1, 6.2, 8.5, 9.6, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019). *See also* Julia Dehm, *International Law, Temporalities and Narratives of the Climate Crisis*, 4 LONDON REV. INT'L L. 167 (2016); Anne Saab, *Discourses of Fear on Climate Change in International Human Rights Law*, 34 EUR. J. INT'L L. 113 (2023).

267. Hum. Rts. Comm., Billy v. Australia, Communication No. 3624/2019, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 18, 2023) (Comm. Member Duncan Laki Muhumuza, dissenting) (citing *Urgenda*, Dec. 20, 2019, *supra* note 90).

Republic of Chile, in their Advisory Opinion request to the Inter-American Court of Human Rights, have described the "consensus of the scientific community" in identifying "children as the group that is most vulnerable in the long term to the imminent risks to life and well-being as a result of the climate emergency."[268]

In summary, "imminence" is a highly ambiguous term because it can either refer to short-term temporal considerations of prospective harm or can describe the quality or character of harm. It is this uncertainty that is misleading and, indeed, treacherous in international protection cases. "Imminence" in a temporal sense can never be a requirement for protection; the risk of harm does not need to be immediate or approximate in time for protection to be granted. Consequently, and because of the inherent confusion between meanings, imminence should also be avoided to describe a risk of harm in a non-temporal sense, namely, whether it is concrete. The doctrine of "foreseeability" (or reasonable certainty) is here to stay and will—and should—continue to inform the development of states' international protection obligations in the context of climate change and disasters.

268. *Request for an Advisory Opinion*, Inter-Am. Ct. H.R., Jan. 9, 2023, *supra* note 11, at 10.